TEXAS REGISTER

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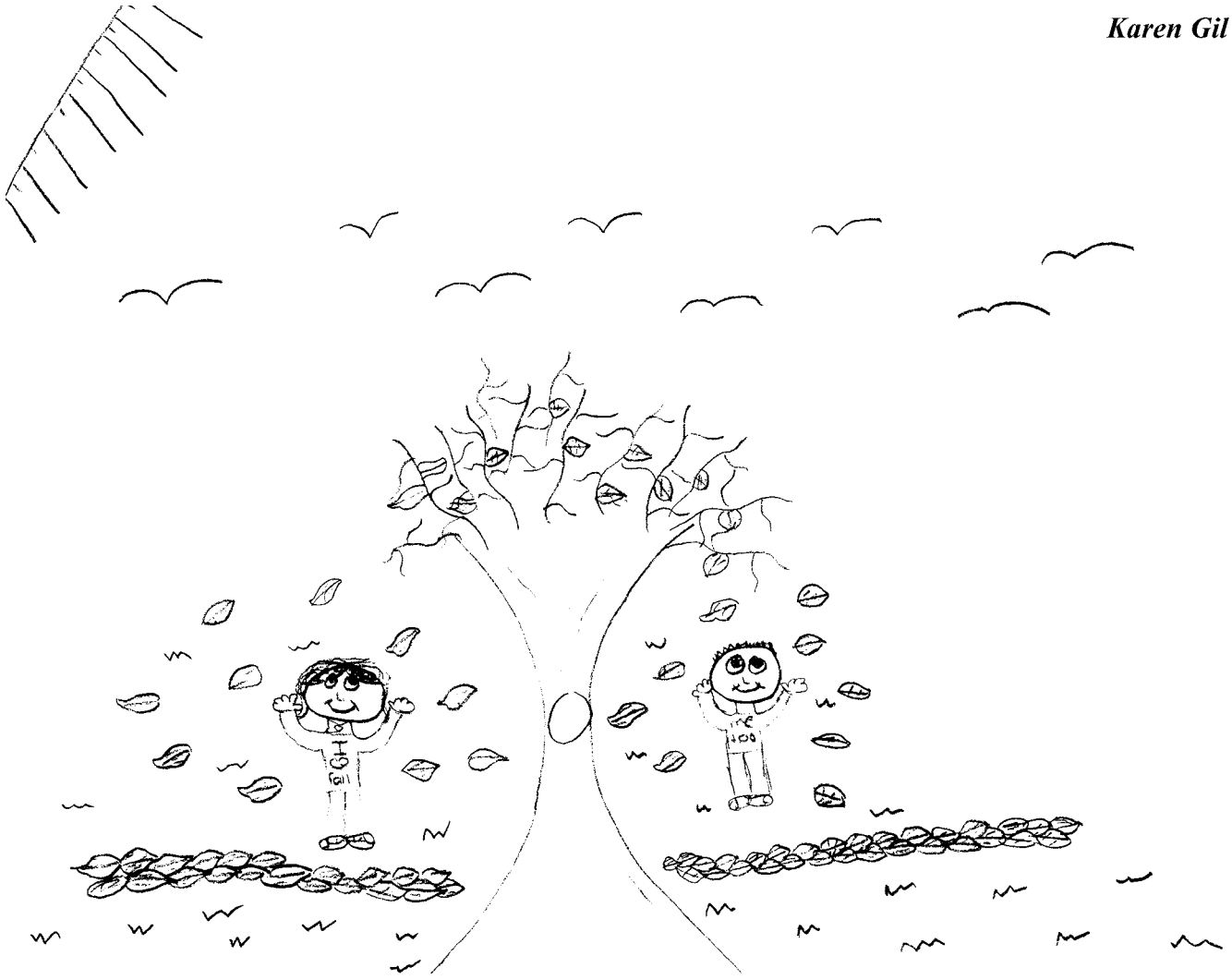
Karen Gil



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THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Requests for Opinions

RQ-1089-GA

Requestor:

The Honorable Noble D. Walker, Jr.

District Attorney

Hunt County

Post Office Box 441

Greenville, Texas 75403-0441

The Honorable Joel D. Littlefield

County Attorney

Hunt County

Post Office Box 1097

Greenville, Texas 75403-1097

Re: Whether a district judge may prohibit the director of a community supervision department from delegating his duties with regard to presentence investigations (RQ-1089-GA)

Briefs requested by November 8, 2012

RQ-1090-GA

Requestor:

The Honorable Richard E. Glaser

Fannin County Criminal District Attorney

101 East Sam Rayburn Drive, Suite 301

Bonham, Texas 75418

Re: Whether a district attorney may, pursuant to section 41.005, Government Code, retain a commission on bond forfeiture collections (RQ-1090-GA)

Briefs requested by November 9, 2012

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-201205377
Katherine Cary
General Counsel
Office of the Attorney General
Filed: October 15, 2012

♦ ♦ ♦

TEXAS ETHICS COMMISSION

The Texas Ethics Commission is authorized by the Government Code, §571.091, to issue advisory opinions in regard to the following statutes: the Government Code, Chapter 302; the Government Code, Chapter 305; the Government Code, Chapter 572; the Election Code, Title 15; the Penal Code, Chapter 36; and the Penal Code, Chapter 39. Requests for copies of the full text of opinions or questions on particular submissions should be addressed to the Office of the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, (512) 463-5800.

Advisory Opinion Requests

AOR-571 and AOR-572. The Texas Ethics Commission has been asked to consider whether a city council's refrigerator magnet constitutes political advertising for purposes of section 255.003 of the Election Code.

The Texas Ethics Commission is authorized by §571.091 of the Government Code to issue advisory opinions in regard to the following statutes: (1) Chapter 572, Government Code; (2) Chapter 302, Government Code; (3) Chapter 303, Government Code; (4) Chapter 305, Government Code; (5) Chapter 2004, Government Code; (6) Title 15, Election Code; (7) Chapter 159, Local Government Code; (8) Chapter 36, Penal Code; (9) Chapter 39, Penal Code; (10) §2152.064, Government Code; and (11) §2155.003, Government Code.

Questions on particular submissions should be addressed to the Texas Ethics Commission, P.O. Box 12070, Capitol Station, Austin, Texas 78711-2070, (512) 463-5800.

TRD-201205408
Natalia Luna Ashley
Special Counsel
Texas Ethics Commission
Filed: October 17, 2012

♦ ♦ ♦

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 358. MEDICAID ELIGIBILITY FOR THE ELDERLY AND PEOPLE WITH DISABILITIES

SUBCHAPTER C. FINANCIAL REQUIREMENTS

The Texas Health and Human Services Commission (HHSC) proposes new §358.356 and §358.388, concerning tuition savings programs, in Chapter 358, Medicaid Eligibility for the Elderly and People with Disabilities.

Background and Justification

The purpose of the new sections is to implement the provisions of House Bill (H.B.) 3708, 82nd Legislature, Regular Session, 2011. H.B. 3708, in part, amended the Texas Human Resources Code by adding §32.02611, which prohibits HHSC from considering assets or resources in prepaid tuition programs and higher education savings plans when making eligibility determinations for Medicaid programs.

Medicaid for the Elderly and People with Disabilities (MEPD) is available to eligible people who need continuous, long-term services and supports, including people who receive Supplemental Security Income. Services can be provided either through community programs while the person is living at home or in a place of care where the person lives, such as a nursing facility or a facility for people with intellectual disabilities.

In determining eligibility for MEPD, HHSC currently counts resources and income in prepaid tuition programs and higher education savings plans (collectively called "tuition savings programs" for purposes of this proposal). The proposed new sections would change the policy for MEPD eligibility determinations to comply with §32.02611 of the Texas Human Resources Code, so that funds used to establish a tuition savings program, or payments made from or interest earned on a tuition savings program, would be excluded from resources and income calculations in determining financial eligibility for MEPD programs.

Related proposals for rules governing the Medicare Savings Program, Medicaid Buy-In Program, and Medicaid Buy-In for Children Program appear elsewhere in this issue of the *Texas Register.*

Section-by-Section Summary

Proposed new §358.356 and §358.388 define "tuition savings program" and "beneficiary" for purposes of each section and state that HHSC does not count funds used to establish a tuition savings program, or payments made from or interest earned on a tuition savings program, as resources or as income, respectively. The new sections clarify that the tuition savings program must have been established before the beneficiary's 21st birthday by a relative as described in each rule and provide conditions under which the exclusion would not apply.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that, for the first five years the proposed new sections are in effect, enforcing or administering the new sections does not have significant foreseeable implications relating to costs or revenues of state or local governments. There are no anticipated economic costs to persons who are required to comply with the proposed rules. There is no anticipated effect on employment in a local economy.

Small Business and Micro-business Impact Analysis

Ms. Rymal has also determined that there will be no effect on small businesses or micro-businesses to comply with the proposal, because the new rules govern the eligibility of individuals for certain Medicaid programs and do not affect businesses.

Public Benefit

Stephanie Muth, Deputy Executive Commissioner for Social Services, has determined that, for each year of the first five years the new sections are in effect, the anticipated public benefit expected as a result of enforcing the new sections is that policy will comply with state law and individuals will not be determined ineligible for medical assistance as a result of saving for college or using funds in a tuition savings program for college.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her real property that would otherwise exist in the absence of government action and, therefore, does

not constitute a taking under §2007.043 of the Texas Government Code.

Public Comment

Written comments on the proposal may be submitted to Janice Quertermous, Health and Human Services Commission, Policy Strategy, Analysis and Development, MC-2115, 909 West 45th Street, Austin, TX 78751, or by e-mail to *janice.quertermous@hhsc.state.tx.us,* within 30 days after publication of this proposal in the *Texas Register.*

Public Hearing

A public hearing is scheduled for November 9, 2012, at 1:30 p.m. (central time) in Room 164 of the HHSC-MHMR Center, 909 West 45th Street, Building 2, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Graciela Reyna at (512) 206-4778 at least 72 hours prior to the hearing so appropriate arrangements can be made.

DIVISION 2. RESOURCES

1 TAC §358.356

Legal Authority

The new section is proposed under Texas Government Code §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; the Texas Human Resources Code §32.021 and Texas Government Code §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Human Resources Code §32.02611, which prohibits HHSC from considering assets or resources in prepaid tuition programs and higher education savings plans when determining eligibility for Medicaid programs.

The new section affects the Texas Government Code, Chapter 531, and the Texas Human Resources Code, Chapter 32. No other statutes, articles, or codes are affected by this proposal.

§358.356. Tuition Savings Programs.

(a) The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise.

(1) Tuition savings program--

(A) a prepaid tuition program or higher education savings plan authorized under Chapter 54, Subchapter G, H, or I of the Texas Education Code; or

(B) a qualified tuition program of any state that meets the requirements of §529 of the Internal Revenue Service Code of 1986.

(2) Beneficiary--A designated individual whose qualified higher education expenses are expected to be paid from a tuition savings program.

(b) The Texas Health and Human Services Commission excludes funds used to establish a tuition savings program and payments made from or interest earned on a tuition savings program, if the tuition savings program was established:

(1) before the beneficiary's 21st birthday; and

(2) by the beneficiary's parent, stepparent, spouse, grandparent, brother, sister, uncle, or aunt, whether related by whole blood, half blood, or adoption.

(c) The resource exclusion described in subsection (b) of this section does not apply:

(1) if a withdrawal from the tuition savings program is made for any purpose other than paying qualified educational expenses of the beneficiary; or

(2) if the tuition savings program is cancelled.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 10, 2012.

TRD-201205285
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 424-6900

♦ ♦ ♦

DIVISION 3. INCOME

1 TAC §358.388

Legal Authority

The new section is proposed under Texas Government Code §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; the Texas Human Resources Code §32.021 and Texas Government Code §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Human Resources Code §32.02611, which prohibits HHSC from considering assets or resources in prepaid tuition programs and higher education savings plans when determining eligibility for Medicaid programs.

The new section affects the Texas Government Code, Chapter 531, and the Texas Human Resources Code, Chapter 32. No other statutes, articles, or codes are affected by this proposal.

§358.388. Tuition Savings Programs.

(a) The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise.

(1) Tuition savings program--

(A) a prepaid tuition program or higher education savings plan authorized under Chapter 54, Subchapter G, H, or I of the Texas Education Code; or

(B) a qualified tuition program of any state that meets the requirements of §529 of the Internal Revenue Service Code of 1986.

(2) Beneficiary--A designated individual whose qualified higher education expenses are expected to be paid from a tuition savings program.

(b) The Texas Health and Human Services Commission excludes funds used to establish a tuition savings program and payments made from or interest earned on a tuition savings program, if the tuition savings program was established:

(1) before the beneficiary's 21st birthday; and

(2) by the beneficiary's parent, stepparent, spouse, grandparent, brother, sister, uncle, or aunt, whether related by whole blood, half blood, or adoption.

(c) The income exclusion described in subsection (b) of this section does not apply:

(1) to a person in the institutional special income limit coverage group described in §358.107(c)(2) of this chapter (relating to Coverage Groups);

(2) if a withdrawal from the tuition savings program is made for any purpose other than paying qualified educational expenses of the beneficiary; or

(3) if the tuition savings program is cancelled.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 10, 2012.

TRD-201205286
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 424-6900

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CHAPTER 359. MEDICARE SAVINGS PROGRAM

1 TAC §§359.101, 359.103, 359.109

The Texas Health and Human Services Commission (HHSC) proposes to amend §359.101, concerning purpose and scope, §359.103, concerning Qualified Medicare Beneficiary Program, and §359.109, Qualified Disabled and Working Individual Program, in Chapter 359, Medicare Savings Program.

Background and Justification

Medicare savings programs are for people who receive Medicare and need help paying for Medicare premiums, co-insurance, and deductibles. If a person meets income and resource requirements of a Medicare savings program, Medicaid will help pay for some Medicare costs. The four Medicare savings programs administered by HHSC are the Qualifying Individual (QI) program, the Specified Low-Income Medicare Beneficiary (SLMB) program, the Qualified Medicare Beneficiary (QMB) program, and the Qualified Disabled and Working Individual (QDWI) program.

The purpose of the amendment to §359.101 is to correct the name of the QI program, which appears in the rule currently as the "Qualified"--rather than "Qualifying"--Individual program.

The purpose of the amendments to §359.103 and §359.109 is to implement the provisions of House Bill (H.B.) 3708, 82nd Legislature, Regular Session, 2011. H.B. 3708, in part, amended the Texas Human Resources Code by adding §32.02611, which prohibits HHSC from considering assets or resources in prepaid tuition programs and higher education savings plans when making eligibility determinations for Medicaid programs.

In determining eligibility for the QMB program, HHSC currently counts resources and income in prepaid tuition programs and higher education savings plans (collectively called "tuition savings programs" for purposes of this proposal) in compliance with 42 U.S.C. §1396d(p). The proposed amendment to §359.103 would change the policy for QMB eligibility determinations to comply with §32.02611 of the Texas Human Resources Code, so that funds used to establish a tuition savings program, or payments made from or interest earned on a tuition savings program, would be excluded from resources and income calculations in determining financial eligibility for QMB.

In determining eligibility for the QDWI program, HHSC currently counts resources and income in tuition savings programs. The proposed amendment to §359.109 would change the policy for QDWI eligibility determinations to comply with §32.02611 of the Texas Human Resources Code, so that funds used to establish a tuition savings program, or payments made from or interest earned on a tuition savings program, would be excluded from resources and income calculations in determining financial eligibility for QDWI.

Similar policy changes will apply to the SLMB and QI programs. Amendments to the eligibility rules for those programs are not needed, however, because their eligibility requirements are based on and cross-referenced to the QMB eligibility requirement in §359.103.

Related proposals for rules governing eligibility for Medicaid for the elderly and people with disabilities, the Medicaid Buy-In Program, and the Medicaid Buy-In for Children Program appear elsewhere in this issue of the *Texas Register.*

Section-by-Section Summary

The proposed amendment to §359.101, in subsection (b)(3), changes the word "Qualified" to "Qualifying" to accurately reflect the name of the QI program.

The proposed amendment to §359.103, in subsection (b)(2) and (3), excepts payments made from or interest earned on a tuition savings program, as well as funds used to establish a tuition savings program, from being counted as income or resources for the QMB program.

The proposed amendment to §359.109, in subsection (b)(4) and (5), excepts payments made from or interest earned on a tuition savings program, as well as funds used to establish a tuition savings program, from being counted as income or resources for the QDWI program.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable significant implications relating to costs or revenues of state or local governments. There are no anticipated economic costs to persons who are required to comply with the proposed rules. There is no anticipated effect on employment in a local economy.

Small Business and Micro-business Impact Analysis

Ms. Rymal has also determined that there will be no effect on small businesses or micro-businesses to comply with the proposal, because the amended rules govern the eligibility of individuals for certain Medicare savings programs and do not affect businesses.

Public Benefit

Stephanie Muth, Deputy Executive Commissioner for Social Services, has determined that, for each year of the first five years the amendments are in effect, the anticipated public benefit expected as a result of enforcing the amendments is that policy will comply with state law and individuals will not be determined ineligible for medical assistance as a result of saving for college or using funds in a tuition savings program for college.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her real property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Texas Government Code.

Public Comment

Written comments on the proposal may be submitted to Janice Quertermous, Health and Human Services Commission, Policy Strategy, Analysis and Development, MC-2115, 909 West 45th Street, Austin, TX 78751, or by e-mail to *janice.quertermous@hhsc.state.tx.us,* within 30 days after publication of this proposal in the *Texas Register.*

Public Hearing

A public hearing is scheduled for November 9, 2012, at 1:30 p.m. (central time) in Room 164 of the HHSC-MHMR Center, 909 West 45th Street, Building 2, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Graciela Reyna at (512) 206-4778 at least 72 hours prior to the hearing so appropriate arrangements can be made.

Legal Authority

The amendments are proposed under Texas Government Code §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; the Texas Human Resources Code §32.021 and Texas Government Code §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Human Resources Code §32.02611, which prohibits HHSC from considering assets or resources in prepaid tuition programs and higher education savings plans when determining eligibility for Medicaid programs.

The amendments affect the Texas Government Code, Chapter 531, and the Texas Human Resources Code, Chapter 32. No other statutes, articles, or codes are affected by this proposal.

§359.101. Purpose and Scope.

(a) This chapter describes the assistance available and eligibility requirements for the Medicare Savings Program. Authorized under 42 U.S.C. §1396a(a)(10)(E), the Medicare Savings Program uses Medicaid funds to help eligible persons pay for all or some of their out-of-pocket Medicare expenses, such as premiums, deductibles, or coinsurance.

(b) The Texas Health and Human Services Commission (HHSC) manages the Medicare Savings Program, which consists of the following:

(1) the Qualified Medicare Beneficiary (QMB) Program;

(2) the Specified Low-Income Medicare Beneficiary (SLMB) Program;

(3) the Qualifying [~~Qualified~~] Individual (QI) Program; and

(4) the Qualified Disabled and Working Individual (QDWI) Program.

(c) Nothing in these rules shall be construed to violate the maintenance of eligibility requirements of section 5001 of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5) and make eligibility standards, methodologies, or procedures under the Texas State Plan for Medical Assistance (or any waiver under section 1115 of the Social Security Act (42 U.S.C. §1315)) more restrictive than the eligibility standards, methodologies, or procedures, respectively, under such plan (or waiver) that were in effect on July 1, 2008.

§359.103. Qualified Medicare Beneficiary Program.

(a) Authorized under 42 U.S.C. §1396a(a)(10)(E)(i), the Qualified Medicare Beneficiary (QMB) Program pays Medicare premiums, deductibles, and coinsurance for a person who meets the requirements of this section. A person receiving Medicaid may also receive QMB benefits if the person meets the requirements of this section.

(b) To be eligible for QMB coverage, a person must:

(1) be entitled to benefits under Medicare Part A; [~~and~~]

(2) meet income [~~and resources~~] requirements in 42 U.S.C. §1396d(p), except for payments made from or interest earned on a tuition savings program under §358.388 of this title (relating to Tuition Savings Programs); and[~~.~~]

(3) meet resource requirements in 42 U.S.C. §1396d(p), except for funds used to establish a tuition savings program under §358.356 of this title (relating to Tuition Savings Programs).

(c) A person is not eligible for QMB coverage if the person:

(1) is in the custody of penal authorities as defined in 42 C.F.R. §411.4(b); or

(2) is over 20 years of age and under 65 years of age and resides in an institution for mental diseases.

(d) A person's QMB eligibility begins on the first day of the month after the month the person is certified for QMB benefits.

(e) A person with QMB coverage is not eligible for three months prior medical coverage.

§359.109. Qualified Disabled and Working Individual Program.

(a) Authorized under 42 U.S.C. §1396a(a)(10)(E)(ii), the Qualified Disabled and Working Individual (QDWI) Program pays only Medicare Part A premiums for a person who meets the requirements of this section. A person cannot be eligible for regular Medicaid and QDWI coverage at the same time.

(b) To be eligible for QDWI coverage, a person must:

(1) be under 65 years of age;

(2) be entitled to benefits under Medicare Part A;

(3) not otherwise be eligible for Medicaid;

(4) have a monthly income equal to or less than 200% of the federal poverty level, except for payments made from or interest earned on a tuition savings program under §358.388 of this title (relating to Tuition Savings Programs); and

(5) have no more than twice the countable resources allowed under the Supplemental Security Income (SSI) program, as described in §1611 of the Social Security Act (42 U.S.C. §1382), except for funds used to establish a tuition savings program under §358.356 of this title (relating to Tuition Savings Programs).

(c) A person's QDWI eligibility begins in accordance with the coverage period described in §1818A of the Social Security Act (42 U.S.C. §1395i-2a(c)).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 10, 2012.

TRD-201205284
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 424-6900

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CHAPTER 360. MEDICAID BUY-IN PROGRAM

1 TAC §360.113

The Texas Health and Human Services Commission (HHSC) proposes to amend §360.113, concerning resources, in Chapter 360, Medicaid Buy-In Program.

Background and Justification

The Medicaid Buy-In Program (MBI) provides Medicaid benefits to eligible people with disabilities who work, regardless of their age. People "buy in" to the program by paying a monthly payment.

The purpose of the amendment to §360.113 is to implement the provisions of House Bill (H.B.) 3708, 82nd Legislature, Regular Session, 2011. H.B. 3708, in part, amended the Texas Human Resources Code by adding §32.02611, which prohibits HHSC from considering assets or resources in prepaid tuition programs and higher education savings plans when making eligibility determinations for Medicaid programs.

In determining eligibility for MBI, HHSC currently counts resources in prepaid tuition programs and higher education savings plans (collectively called "tuition savings programs" for purposes of this proposal). The proposed amendment would change the policy for MBI eligibility determinations to comply with §32.02611 of the Texas Human Resources Code, so that funds used to establish a tuition savings program would be excluded from the calculation of resources in determining financial eligibility for MBI. Unearned income, such as payments received from or interest earned on a tuition savings program, is not counted in the eligibility determination for MBI and, thus, is not addressed in this proposal.

Related proposals for rules governing eligibility for Medicaid for the elderly and people with disabilities, Medicare savings programs, and the Medicaid Buy-In for Children Program appear elsewhere in this issue of the *Texas Register.*

Section-by-Section Summary

The proposed amendment to §360.113 adds new subsection (b)(3), which includes tuition savings programs in the list of resources that are not counted in the determination of financial eligibility for MBI.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that, for the first five years the proposed amendment is in effect, enforcing or administering the amendment does not have significant foreseeable implications relating to costs or revenues of state or local governments. There are no anticipated economic costs to persons who are required to comply with the proposed rule. There is no anticipated effect on employment in a local economy.

Small Business and Micro-business Impact Analysis

Ms. Rymal has also determined that there will be no effect on small businesses or micro-businesses to comply with the proposal, because the amended rule governs the eligibility of individuals for MBI and does not affect businesses.

Public Benefit

Stephanie Muth, Deputy Executive Commissioner for Social Services, has determined that, for each year of the first five years the amendment is in effect, the anticipated public benefit expected as a result of enforcing the amendments is that policy will comply with state law and individuals will not be determined ineligible for medical assistance as a result of saving for college or using funds in a tuition savings program for college.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her real property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Texas Government Code.

Public Comment

Written comments on the proposal may be submitted to Janice Quertermous, Health and Human Services Commission, Policy Strategy, Analysis and Development, MC-2115, 909 West 45th Street, Austin, TX 78751, or by e-mail to *janice.quertermous@hhsc.state.tx.us,* within 30 days after publication of this proposal in the *Texas Register.*

Public Hearing

A public hearing is scheduled for November 9, 2012, at 1:30 p.m. (central time) in Room 164 of the HHSC-MHMR Center, 909 West 45th Street, Building 2, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Graciela Reyna at (512) 206-4778 at least 72 hours prior to the hearing so appropriate arrangements can be made.

Legal Authority

The amendment is proposed under Texas Government Code §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; the Texas Human Resources Code §32.021 and Texas Government Code §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Human Resources Code §32.02611, which prohibits HHSC from considering assets or resources in prepaid tuition programs and higher education savings plans when determining eligibility for Medicaid programs.

The amendment affects the Texas Government Code, Chapter 531, and the Texas Human Resources Code, Chapter 32. No other statutes, articles, or codes are affected by this proposal.

§360.113. Resources.

(a) To establish and maintain eligibility for MBI, a person's countable resources must be equal to or less than $3,000 plus the amount of the Supplemental Security Income (SSI) resource limit for an individual that is explained in 20 CFR §416.1205. Countable resources means resources for SSI purposes as defined in 20 CFR §416.1205, minus all applicable exemptions and exclusions explained in 20 CFR §§416.1207 - 416.1239.

(b) In addition to the exemptions and exclusions explained in subsection (a) of this section, the following are not countable resources under this section:

(1) Independence accounts.

(A) An independence account (IA) is a segregated account in a financial institution, the purpose of which is to save for future health care and work-related expenses to increase an individual's independence and employment potential.

(B) Only a person's own earned income may be deposited into an IA, and amounts deposited cannot exceed 50% of the person's gross earnings. If for any SSA Qualifying Quarter a person deposits more than 50% of the person's gross earnings into an account that is designated as an IA, the account loses its IA designation and the funds in the account become a countable resource for the 12-month period beginning with the first month after the SSA Qualifying Quarter. An SSA Qualifying Quarter is a three-month period that ends on March 31, June 30, September 30, and December 31 of each calendar year and during which a person's reported earnings and FICA contributions are enough for SSA to give the person Social Security wage credits.

(C) Only health care or work-related expenses may be paid from an IA. For any SSA Qualifying Quarter, if funds in an IA account are used for any other purpose, the account loses its IA designation and the funds in the account become a countable resource for the 12-month period beginning with the first month after the SSA Qualifying Quarter.

(2) Retirement related tax-sheltered accounts. Retirement related tax-sheltered accounts include IRAs, 401(k)s, TSAs, and KEOUGHs that comply with IRS regulations.

(3) Tuition savings programs. The Texas Health and Human Services Commission excludes funds used to establish a tuition savings program under §358.356 of this title (relating to Tuition Savings Programs).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 10, 2012.

TRD-201205287
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 424-6900

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CHAPTER 361. MEDICAID BUY-IN FOR CHILDREN PROGRAM

1 TAC §361.111

The Texas Health and Human Services Commission (HHSC) proposes to amend §361.111, concerning income, in Chapter 361, Medicaid Buy-In for Children Program.

Background and Justification

The Medicaid Buy-In for Children Program (MBIC) provides health care to eligible children with disabilities whose families have too much income to receive regular Medicaid benefits but who need help with their children's medical bills. Families "buy in" to the program by paying a monthly premium.

The purpose of the amendment to §361.111 is to implement the provisions of House Bill (H.B.) 3708, 82nd Legislature, Regular Session, 2011. H.B. 3708, in part, amended the Texas Human Resources Code by adding §32.02611, which prohibits HHSC from considering assets or resources in prepaid tuition programs and higher education savings plans when making eligibility determinations for Medicaid programs.

In determining eligibility for MBIC, HHSC currently counts the income from prepaid tuition programs and higher education savings plans (collectively called "tuition savings programs" for purposes of this proposal). The proposed amendment would change the policy for MBIC eligibility determinations to comply with §32.02611 of the Texas Human Resources Code, so that payments made from or interest earned on a tuition savings program would be excluded from the calculation of income in determining financial eligibility for MBIC. Resources, such as funds used to establish a tuition savings program, are not counted in the eligibility determination for MBIC and, thus, are not addressed in this proposal.

Related proposals for rules governing eligibility for Medicaid for the elderly and people with disabilities, Medicare savings programs, and the Medicaid Buy-In Program appear elsewhere in this issue of the *Texas Register.*

Section-by-Section Summary

The proposed amendment to §361.111 adds new subsection (b)(2)(B), which exempts payments made from or interest earned

on a tuition savings programs from being counted as income for MBIC.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that, for the first five years the proposed amendment is in effect, enforcing or administering the amendment does not have significant foreseeable implications relating to costs or revenues of state or local governments. There are no anticipated economic costs to persons who are required to comply with the proposed rule. There is no anticipated effect on employment in a local economy.

Small Business and Micro-business Impact Analysis

Ms. Rymal has also determined that there will be no effect on small businesses or micro-businesses to comply with the proposal, because the amended rule governs the eligibility of individuals for MBI and does not affect businesses.

Public Benefit

Stephanie Muth, Deputy Executive Commissioner for Social Services, has determined that, for each year of the first five years the amendment is in effect, the anticipated public benefit expected as a result of enforcing the amendments is that policy will comply with state law and individuals will not be determined ineligible for medical assistance as a result of saving for college or using funds in a tuition savings program for college.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her real property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Texas Government Code.

Public Comment

Written comments on the proposal may be submitted to Janice Quertermous, Health and Human Services Commission, Policy Strategy, Analysis and Development, MC-2115, 909 West 45th Street, Austin, TX 78751, or by e-mail to *janice.quertermous@hhsc.state.tx.us,* within 30 days after publication of this proposal in the *Texas Register.*

Public Hearing

A public hearing is scheduled for November 9, 2012, at 1:30 p.m. (central time) in Room 164 of the HHSC-MHMR Center, 909 West 45th Street, Building 2, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Graciela Reyna at (512) 206-4778 at least 72 hours prior to the hearing so appropriate arrangements can be made.

Legal Authority

The amendment is proposed under Texas Government Code §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; the Texas Human Resources Code §32.021 and Texas Government Code §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Human Resources Code §32.02611, which prohibits HHSC from considering assets or resources in prepaid tuition programs and higher education savings plans when determining eligibility for Medicaid programs.

The amendment affects the Texas Government Code, Chapter 531, and the Texas Human Resources Code, Chapter 32. No other statutes, articles, or codes are affected by this proposal.

§361.111. Income.

(a) To be eligible for MBIC, a child's family must have monthly countable income less than or equal to 150% of the Federal Poverty Level (FPL).

(b) Countable income means:

(1) earned income for purposes of the Supplemental Security Income (SSI) program minus all applicable exclusions and exemptions, as explained in 20 CFR §§416.1110 - 416.1112; and

(2) unearned income for purposes of the SSI program minus all applicable exclusions and exemptions, as explained in 20 CFR §§416.1120 - 416.1124, except HHSC does not count as income:

(A) in-kind support and maintenance; or [~~as income.~~]

(B) payments made from or interest earned on a tuition savings program under §358.388 of this title (relating to Tuition Savings Programs).

(c) To determine the family's monthly countable income, HHSC counts the income of the child applying for or receiving MBIC, the income of the child's parents living in the same household as the child, and the income of the child's ineligible siblings living in the same household as the child.

(1) For a stepparent's income to count, the stepparent must be the current husband or wife of a natural or adoptive parent living in the same household as the child and the natural or adoptive parent.

(2) A sibling's income counts through the month of the sibling's:

(A) 18th birthday; or

(B) 22nd birthday, if the sibling is, as determined by HHSC, regularly attending school, college, or job training.

(3) HHSC calculates the family's monthly countable income as follows:

(A) Total the following:

(i) Monthly countable income of the child applying for or receiving MBIC.

(ii) Combined monthly countable income of the child's parents.

(iii) Countable monthly income of each of the child's ineligible siblings that is in excess of 150% of the FPL for a household of one, multiplied by 2, plus $85.

(B) Subtract $85 from the total arrived at in subparagraph (A) of this paragraph.

(C) Divide the total arrived at in subparagraph (B) of this paragraph by 2.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 10, 2012.

TRD-201205288
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 424-6900

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CHAPTER 371. MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD AND ABUSE PROGRAM INTEGRITY

The Texas Health and Human Services Commission (HHSC) proposes the repeal of §371.1000, concerning Provider Re-Enrollment or Provider Contract Modification; §371.1621, concerning Provider Enrollment; §371.1623, concerning Criminal History Checks; §371.1625, concerning Use of Criminal History Information; and §371.1627, concerning Administrative Review of Rejection of Provider Enrollment by Reason of Criminal History. HHSC also proposes new §§371.1001, 371.1003, 371.1005, 371.1007, 371.1009, 371.1011, 371.1013, and 371.1015, concerning provider disclosure and screening requirements for Medicaid and other health and human services (HHS) programs in Texas.

HHSC intends that any obligations or requirements that accrued under Chapter 371, Subchapter E before the effective date of these rules will be governed by the prior rules in Subchapter G, and that those rules continue in effect for this purpose. HHSC does not intend for the repeal or enactment of the rules in Subchapter G to affect the prior operation of the rules; any prior actions taken under the rules; any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred under the rules; any violation of the rules or any penalty, forfeiture, or punishment incurred under the rules before their amendment or repeal; or any investigation, proceeding, or remedy concerning any privilege, obligation, liability, penalty, forfeiture, or punishment. HHSC additionally intends that any investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the rules had not been repealed or amended.

HHSC intends that should any sentence, paragraph, subdivision, clause, phrase, or section of the amended or new rules in Subchapter E be determined, adjudged, or held to be unconstitutional, illegal or invalid, the same shall not affect the validity of the subchapter as a whole, or any part or provision hereof other than the part so declared to be unconstitutional, illegal, or invalid, and shall not affect the validity of the subchapter as a whole.

Background and Justification

The existing rules in Chapter 371 include various provisions to ensure Medicaid and other HHS program integrity by discovering, preventing, and correcting fraud, waste, and abuse.

The new rules in Chapter 371, Subchapter E, in part, are proposed in light of recent state and federal legislation, including the federal Patient Protection and Affordable Care Act (ACA); the Texas Human Resources Code §32.0322 and §32.047; and the Texas Health and Safety Code §62.1561.

The new federal provisions include:

- Pre- and post-enrollment site visits conducted as part of provider enrollment in accordance with the level of risk associated with that provider type.

- Background check requirements and fingerprinting if required.

- Enhanced screening and verification requirements for high risk applicants.

- Additional applicant disclosure requirements.

- Collection of application fees from institutional providers as described in federal rule.

- Sharing of collected information between state programs and the federal government.

Additionally, the new rules are being revised to delete unnecessary language, revise or eliminate obsolete terminology, and to provide better and more helpful organization. The repeals of §§371.1621, 371.1623, 371.1625, and 371.1627 are proposed to remove them from Subchapter G and place them with other provider enrollment requirements in Subchapter E.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (the Administrative Procedure Act). HHSC has reviewed all sections in Chapter 371, Subchapter E, and has determined that, although the reasons for adopting rules governing Medicaid program integrity continue to exist, some provisions of Subchapter E are obsolete or unnecessary and need updating.

Section-by-Section Summary

Subchapter E changing from Operating Agency Responsibilities to Provider Disclosure and Screening.

Proposed new §371.1001 sets out the applicability of the rules in Subchapter E.

Proposed new §371.1003 includes definitions that apply to the requirements of Subchapter E.

Proposed new §371.1005 prescribes the requirements for disclosure as part of the provider screening and enrollment process.

Proposed new §371.1007 describes the screening levels that may apply to provider applicants and provides that applicants with certain histories may be categorized as a higher risk for screening purposes.

Proposed new §371.1009 identifies the level of screening efforts that will apply to each screening level.

Proposed new §371.1011 identifies the grounds that may constitute a basis for recommending denial of the application. It further provides that HHSC may recommend approval of an application on a case-by-case basis despite a negative history, and identifies the factors that will be considered in that determination.

Proposed new §371.1013 provides that the HHSC Office of Inspector General will make an enrollment recommendation to HHSC, which HHSC will use in arriving at a final enrollment determination.

Proposed new §371.1015 describes the types of recommendations and grants an informal desk review to any applicant whose

application has been denied or abated based upon a recommendation by HHSC Office of Inspector General.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that there is insufficient data to calculate the fiscal impact to state government. The new rules provide procedures for enforcement of several new program integrity initiatives enacted in the Patient Protection and Affordable Care Act and ensuing state legislation. These activities will increase workloads and litigation for the State's OIG Medicaid Provider Integrity and Provider Integrity Research sections. These are new initiatives and there is no data to provide a related cost estimate.

It is assumed that the cost of enrollment and screening will be offset at least in part by the collection of the provider application fee required in law. Costs in excess of fees collected would be matched at the regular Medicaid rates for administration. Upon prior approval, CMS pays a match rate of 90% for implementation of MMIS systems to support the new ACA provider screening and enrollment provisions. For ongoing operational staff performing Medicaid functions, the match rates will be 75% Federal:25% State for staff who are licensed medical professionals and 50% Federal:50% State for staff who are not. Any collections in excess of related costs must be returned to the federal government.

The proposed rule will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small Business and Micro-business Impact Analysis

Ms. Rymal has also determined that there could be an effect on small businesses or micro businesses to comply with the proposed/repealed rules, as they could be required to pay an enrollment fee even though they are providers for a state-only program.

HHSC and its designee must collect the applicable application fee prior to executing a provider agreement from a prospective or re-enrolling provider. Certain providers enrolled as "organizations" and recognized as small or micro-businesses, such as durable medical equipment, will be required to pay the application fee unless they have paid a fee to Medicare, another state's Medicaid agency, or CHIP. The estimated total number of providers who are subjected to application fee requirement is 13,775. If the State demonstrates that the imposition of fee would impede beneficiary access to care, CMS may grant a hardship exception on a broader or categorical basis for certain Medicaid provider types or geographical areas.

Cost to Persons and Effect on Local Economies

HHSC anticipates that there may be economic costs to persons required to comply with this proposal. Those costs could include increased photocopying, information resources, human resources and possible application fees, if not already paid to another state or to the federal government. These rules will not have an impact on local economies because HHSC has no data to indicate that they will affect employment.

Public Benefit

Karen Nelson, Chief Counsel for the Office of Inspector General, determined that for the first five years the proposal is in effect, the public benefit expected as a result of enforcing the proposal is that enhanced program integrity measures that occur prior to admission could result in fewer instances of provider fraud, waste, or abuse in the future, thus providing better oversight of the public's tax dollars.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her private real property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Texas Government Code.

Public Comment

Written comments on the proposal may be submitted to Casandra Carreno, Texas Health and Human Services Commission, P.O. Box 85200, MC H-400, Austin, Texas 78708-5200; by fax to (512) 833-6484; or by e-mail to Cassandra.Carreno@hhsc.state.tx.us within 30 days of publication in the *Texas Register.*

A public hearing is scheduled for November 2, 2012, from 10:30 a.m. to 11:30 a.m. (central time) in the John H. Winters Building, Public Hearing Room, 125-E, located at 701 W. 51st Street, Austin, Texas. Persons requiring further information, special assistance or accommodations should contact Cassandra Carreno at (512) 833-6484.

SUBCHAPTER E. OPERATING AGENCY RESPONSIBILITIES RULE

1 TAC §371.1000

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Health and Human Services Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

Legal Authority

The repeal is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient operation of the Medicaid program; and Texas Human Resources Code §32.0322, which directs HHSC to establish certain provider screening, disclosure, and verification criteria by rule.

The repeal affects Texas Government Code, Chapter 531, and Human Resources Code, Chapter 32. No other statutes, articles or codes are affected by the proposal.

§371.1000. Provider Re-enrollment or Provider Contract Modification.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205365
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 424-6900

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SUBCHAPTER E. PROVIDER DISCLOSURE AND SCREENING

1 TAC §§371.1001, 371.1003, 371.1005, 371.1007, 371.1009, 371.1011, 371.1013, 371.1015

Legal Authority

The new rules are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient operation of the Medicaid program; and Texas Human Resources Code §32.0322, which directs HHSC to establish certain provider screening, disclosure, and verification criteria by rule.

The new rules affect Texas Government Code, Chapter 531, and Human Resources Code, Chapter 32. No other statutes, articles or codes are affected by the proposal.

§371.1001. Applicability.

(a) This subchapter describes the disclosure requirements for applications and screening criteria used by the HHSC Office of Inspector General (HHSC-OIG) in making a recommendation for an enrollment determination.

(b) This subchapter applies to:

(1) all applicants for enrollment as a provider in the Medicaid program or the Children's Health Insurance Program; and

(2) if requested by a health and human services agency, applicants for enrollment with a health and human services agency program.

§371.1003. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Applicant--An individual or an entity that has filed an enrollment application to become a provider, re-enroll as a provider, or enroll a new practice location in Medicaid program or the Children's Health Insurance Program.

(2) Children's Health Insurance Program (CHIP)--The Texas State Children's Health Insurance Program established under Title XXI of the federal Social Security Act (42 U.S.C. §§1397aa, et seq.) and Chapter 62 of the Health and Safety Code.

(3) Enrollment application--A form prescribed by the Texas Health and Human Services Commission (HHSC) that a provider or applicant submits to HHSC or its designee to enroll or re-enroll as a provider.

(4) Health and human services agency--A state agency identified in §531.001(4) of the Government Code.

(5) HHSC--The Texas Health and Human Services Commission (HHSC).

(6) Medicaid--The medical assistance program, a state and federal cooperative program authorized under Title XIX of the Social Security Act that pays for certain medical and health care costs for people who qualify.

(7) Medical assistance--A medical or health care related service, item, benefit, or supply.

(8) Person--Any legally cognizable entity, including an individual, firm, association, partnership, limited partnership, corporation, agency, institution, MCO, Special Investigative Unit, CHIP participant, trust, non-profit organization, special-purpose corporation, limited liability company, professional entity, professional association, professional corporation, accountable care organization, or other organization or legal entity.

(9) Provider--An applicant that successfully completes the enrollment process outlined in this chapter, Chapter 352 of this title (relating to Medicaid and Children's Health Insurance Program Provider Enrollment), if applicable, or another health and human services program.

(10) Provider agreement--An agreement between HHSC and a provider wherein the provider agrees to certain contract provisions as a condition of participation.

§371.1005. Disclosure Requirements.

(a) An applicant must disclose in its enrollment application the identity of any person or entity as requested by HHSC.

(b) The applicant's disclosures must identify every person whose identity must be disclosed pursuant to the Affordable Care Act, Title 42 of the Code of Federal Regulations, or state statute or administrative rule, as amended. Such disclosures include but are not limited to owners, certain subcontractors, creditors, managers, and agents.

(c) An applicant must disclose in its enrollment application every person that previously had an ownership or control interest in the applicant but whose interest was transferred to another person, if the person's former interest was transferred to an immediate family member or to a member of the person's household and the person's former interest was transferred within one year before or at any time after receiving notice of any of the a potential adverse actions by a governmental entity against the person or against a provider for which the person has or had an ownership or control interest.

(d) An applicant must disclose in the enrollment application all information required by state or federal law or regulation, and all additional information requested by HHSC or the HHSC-OIG, in its discretion, during the provider screening and enrollment process.

(e) If any information required to be disclosed under this section changes during the processing of an enrollment application, the applicant or provider must disclose that information pursuant to §352.21 of this title (relating to Duty to Report Changes).

(f) A failure by an applicant, provider, or person to meet any of the disclosure requirements specified in this section constitutes a material non-disclosure of relevant information.

(g) HHSC-OIG may use information submitted by another health and human services agency that relates to information required to be disclosed in lieu of requiring another submission of the same information by the applicant.

§371.1007. Screening Levels.

(a) HHSC-OIG uses a screening level of "Limited," "Moderate," or "High" risk, assigned in accordance with §352.9 of this title (relating to Screening Levels) to determine the verifications and further screening required under §371.1009 of this subchapter (relating to Verifications Required for Each Screening Level).

(b) Case-by-case recommendation of screening levels. For any enrollment application, the HHSC Office of Inspector General may, in its sole discretion and on a case-by-case basis, recommend that HHSC assign a higher or lower screening level in accordance with §352.9(b) of this title if the HHSC-OIG determines in its discretion that the applicant may pose an increased risk of committing fraud, waste, or abuse or may demonstrate unfitness to provide or bill for medical assistance items or services. HHSC-OIG may make such a recommendation after considering all circumstances, including the applicant's criminal, regulatory, and administrative sanction history, as well as the following, if applicable:

(1) The applicant or any person required to be disclosed in the enrollment application is under a payment suspension based on a credible allegation of fraud.

(2) The applicant or any person required to be disclosed in the enrollment application has failed to repay any overpayments incurred under Medicaid, CHIP, or other health and human services programs.

(3) The applicant or any person required to be disclosed in the enrollment application was excluded from participation in Medicaid, CHIP, or other health and human services program during the ten years before the date of the enrollment application.

(4) The applicant is seeking enrollment as a provider type that was subject to a state or federal temporary moratorium, if the moratorium was lifted within six months before the date of the enrollment application.

§371.1009. Verifications Required for Each Screening Level.

(a) For an applicant or provider assigned a screening level of "Limited," HHSC-OIG verifies the accuracy and completeness of the information in or related to the enrollment application, information about the applicant contained in state or federal records, including criminal history records, and any additional information requested of the applicant by HHSC-OIG.

(b) For an applicant assigned a screening level of "Moderate," HHSC-OIG:

(1) verifies all items described in subsection (a) of this section; and

(2) performs at least one unscheduled and unannounced pre- and post-enrollment site visits, as described in subsection (d) of this section and in accordance with §352.9 of this title (relating to Screening Levels), if applicable, as described in subsection (d) of this section.

(c) For an applicant or provider assigned a screening level of "High," HHSC or HHSC-OIG performs:

(1) all the verifications described in subsections (a) and (b) of this section; and

(2) a fingerprint-based criminal history check, in the form and manner prescribed by state or federal law, of each person that is an individual and has an ownership or control interest as defined in §371.1005 of this subchapter (relating to Disclosure Requirements) in the applicant.

(d) An unscheduled and unannounced pre- or post-enrollment site visit conducted in accordance with subsections (b) and (c) of this section verifies compliance with state and federal law, rule, and policy governing the Medicaid and CHIP programs. Documents compiled, subpoenaed, or maintained by the HHSC-OIG in connection with a site visit are confidential pursuant to Texas Government Code §531.1021(g) and (h).

(e) HHSC-OIG, in its sole discretion, may accept previously submitted fingerprints if an individual has been subjected to a fingerprint-based criminal history check by a licensing or regulatory authority or by another state's Medicaid, CHIP, or medical assistance program and the results are made available to HHSC.

§371.1011. Recommendation Criteria.

(a) Except as provided by subsection (b) of this section, HHSC-OIG may recommend denial of an enrollment application of the applicant or a person required to be disclosed in accordance with §371.1005 of this subchapter (relating to Disclosure Requirements) on the basis of information revealed through a criminal history check on the applicant, provider, or a person required to be disclosed.

(b) On a case-by-case basis, the HHSC-OIG may recommend approval of an enrollment application despite the existence of a criminal history. The case-by-case recommendation for approval will be made by considering the following circumstances:

(1) the number of criminal convictions as defined in 42 C.F.R. §1001.2;

(2) the nature and seriousness of the crime;

(3) whether the individual or entity has completed the sentence, punishment, or other requirements that were imposed for the crime and, if so, the length of time since completion;

(4) in the case of an individual, the age of the individual at the time the crime was committed;

(5) whether the crime was committed in connection with the individual's or entity's participation in Medicaid or other health and human services programs;

(6) the extent of the individual's or entity's rehabilitation efforts and outcome;

(7) the conduct of the individual or entity, and the work history of the individual, both before and after the crime;

(8) the relationship of the crime to the individual or entity's fitness or capacity to remain a provider or become a provider;

(9) whether approving the individual or entity would offer the individual or entity the opportunity to engage in further criminal activity;

(10) the extent to which the individual or entity provides relevant information or otherwise demonstrates that approval should be granted; and

(11) any other circumstances that HHSC determines are relevant to the individual or entity's eligibility.

(c) HHSC-OIG may recommend permanent denial of an enrollment application if:

(1) the applicant, provider, or a person required to be disclosed has been convicted, as defined in 42 CFR §1001.2, of an offense

arising from a fraudulent act under Medicaid or other health and human services programs; and

(2) that fraudulent act resulted in injury to an elderly person, a person with a disability, or a person younger than 18 years of age.

(d) HHSC-OIG may recommend denial of an enrollment application if it determines in its discretion that the applicant may pose an increased risk for committing fraud, waste, or abuse or may demonstrate unfitness to provide or bill for medical assistance items or services. In addition to the applicant's criminal, regulatory, and administrative sanction history, HHSC-OIG will consider all applicable circumstances, including the following, if applicable:

(1) the applicant, a person required to be disclosed, or a person with an ownership or control interest in the provider did not submit complete, timely, and accurate information, failed to cooperate with any provider screening methods, or refused to permit access for a site visit;

(2) the applicant or a person required to be disclosed has failed to repay overpayments to Medicaid, CHIP, or other health or human services programs;

(3) the applicant, provider, or a person required to be disclosed pursuant to §371.1005 of this subchapter, has been suspended or prohibited from participating, excluded, terminated, or debarred from participating in any state Medicaid, CHIP or other health and human services agency program;

(4) the applicant, provider, or a person required to be disclosed has participated in Medicaid or CHIP program and failed to bill for medical assistance or refer clients for medical assistance within the 12-month period prior to submission of the enrollment application;

(5) the applicant, provider, or a person required to be disclosed has falsified any information on the enrollment application; and

(6) HHSC-OIG is unable to verify the identity of the applicant, provider, or a person required to be disclosed.

§371.1013. Provider Enrollment Recommendations.

(a) HHSC-OIG makes a recommendation on each enrollment application submitted for review in accordance with the requirements of this subchapter (relating to Provider Disclosure and Screening) and Chapter 352 of this title (relating to Medicaid and Children's Health Insurance Program Provider Enrollment), or other rule, as applicable. The recommendation is at the sole discretion of HHSC-OIG, and is not subject to administrative review or reconsideration.

(b) In making its enrollment recommendation, HHSC-OIG may consider any relevant circumstance or factor as it applies to the applicant, provider, or any person required to be disclosed in the enrollment application in accordance with this subchapter and Chapter 352 of this title, if applicable.

(c) Upon making a recommendation on an enrollment application, HHSC-OIG informs HHSC of its recommendation. HHSC makes the final enrollment decision after considering:

(1) HHSC-OIG's recommendation;

(2) any conditions for approval recommended by HHSC-OIG;

(3) the availability of access to care; and

(4) any other relevant facts or circumstances.

§371.1015. Types of Provider Enrollment Recommendations.

(a) HHSC-OIG may make the following types of recommendations regarding an enrollment application:

(1) Approval. If an enrollment application is recommended for approval, the recommendation is for a time-limited period of participation as specified in the provider agreement or notification of the enrollment decision. The prospective provider must complete and submit the provider agreement before enrollment is granted.

(2) Conditional approval. An enrollment application may be recommended for conditional approval with conditions as specified in the notification of the enrollment recommendation. The conditions may consist of the imposition of any one or more administrative actions or sanctions as specified in Subchapter G of this chapter (relating to Administrative Actions and Sanctions) or in other Medicaid or CHIP policy or rule.

(3) Abatement. An enrollment application may be abated and the recommendation delayed for up to six months from the date of submission of the completed enrollment application.

(4) Denial. If an enrollment application is denied, HHSC will send a written notice of the decision by certified mail to the address of record on the enrollment application. The reason or reasons for denial are as specified in the written notice. If the denial is based upon a pending investigation, charge, or other legal proceeding, the applicant or provider will be ineligible to reapply until such investigation or proceeding is finally resolved.

(b) If an enrollment application is abated or denied based upon HHSC-OIG's recommendation, an applicant may request an informal desk review by HHSC-OIG of the recommendation within 20 calendar days from the date of the notice of abatement or denial as follows.

(1) The request for an informal desk review must be made in writing and must be submitted in accordance with the instructions in the notice.

(2) The request should state the basis for disagreement with the enrollment recommendation, include any documentary evidence, and describe any mitigating circumstances that would support a reconsideration of the initial enrollment recommendation.

(3) Upon conclusion of the resulting informal desk review, HHSC-OIG will notify HHSC of its final recommendation. HHSC will send a written notice of the final enrollment decision to the address of record on the enrollment application.

(4) The final enrollment recommendation is not subject to administrative review or reconsideration.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205367
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 424-6900

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SUBCHAPTER G. ADMINISTRATIVE ACTIONS AND SANCTIONS

DIVISION 1. GENERAL PROVISIONS

1 TAC §§371.1621, 371.1623, 371.1625, 371.1627

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Health and Human Services Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

Legal Authority

The repeals are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient operation of the Medicaid program; and Texas Human Resources Code §32.0322, which directs HHSC to establish certain provider screening, disclosure, and verification criteria by rule.

The repeals affect Texas Government Code, Chapter 531, and Human Resources Code, Chapter 32. No other statutes, articles or codes are affected by the proposal.

§371.1621. Provider Enrollment.

§371.1623. Criminal History Checks.

§371.1625. Use of Criminal History Record Information.

§371.1627. Administrative Review of Rejection of Provider Enrollment by Reason of Criminal History.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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CHAPTER 372. TEMPORARY ASSISTANCE FOR NEEDY FAMILIES AND SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAMS

The Texas Health and Human Services Commission (HHSC) proposes amendments to §372.904, concerning application processing time frame; §372.1155, concerning consequence for noncooperation with personal responsibility agreement requirements; and §372.1351, concerning Supplemental Nutrition Assistance Program (SNAP) work requirements.

BACKGROUND AND JUSTIFICATION

The amendments are proposed in response to a clarification from the United States Department of Agriculture, Food and Nutrition Service (FNS) regarding Title 7, Code of Federal Regulations (CFR) §273.7(f)(7). Section 273.7(f)(7) provides that if a person receiving SNAP food benefits is also receiving either Temporary Assistance for Needy Families (TANF) or Unemployment Insurance cash benefits, then the person must cooperate with the work requirements of the TANF or Unemployment Insurance programs. If the person fails to cooperate with those work requirements, the person is considered also to have failed to cooperate with SNAP work requirements, unless the person is exempt from SNAP work requirements.

HHSC's current rules and policy do not impose a sanction on SNAP food benefits for failing to cooperate with TANF or Unemployment Insurance work requirements. Therefore, the amendments are proposed to comply with federal regulations. The proposed amendment to §372.1155 provides that if a person fails or refuses to cooperate with a TANF personal responsibility agreement work requirement, the person's SNAP benefits will be subject to consequences for noncompliance with SNAP work requirements, unless the person is exempt from SNAP work requirements. The proposed amendment to §372.1351 will require a person receiving SNAP benefits to participate in TANF or Unemployment Insurance work activities, as applicable, if the person also receives TANF or unemployment insurance benefits. The proposed amendment to §372.904 is a conforming revision to update a cross-reference to §372.1155 affected by the proposed amendment to §372.1155.

SECTION-BY-SECTION SUMMARY

The amendment to §372.904 updates the cross-reference in subsection (a) from §372.1155(d) to §372.1155(e).

The amendment to §372.1155 adds new subsection (d) stating that if a person fails or refuses to cooperate with the TANF personal responsibility agreement requirements described in §372.1154(g), the person's SNAP benefits will be subject to consequences specified in §372.1352 for noncompliance with SNAP work requirements, unless the person is exempt from SNAP work requirements as specified in 7 CFR §273.7. The subsequent subsection is relettered as subsection (e).

The amendment to §372.1351 adds requirements in new paragraphs (5) and (6) for non-exempt members of a household receiving SNAP food benefits to participate in TANF work activities if they are also receiving TANF benefits, and to participate in Unemployment Insurance work activities if they are also receiving Unemployment Insurance benefits. The subsequent paragraphs are renumbered.

FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that, for each year of the first five years the proposed amendments will be in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs of the state or of local governments. There could be a loss of federal revenue to the state government due to withholding benefits from a person who does not meet the SNAP work requirements. It is not currently known how many of the persons receiving both TANF and SNAP benefits are exempt from SNAP work requirements. For that reason, it is not currently possible to provide an estimate of the possible loss of federal funds.

PUBLIC BENEFIT AND COSTS

Stephanie Muth, Deputy Executive Commissioner, Office of Social Services, has determined that, for each year of the first five years the amendments will be in effect, the public benefit expected as a result of adopting the proposed amendments is that

HHSC's rules regarding SNAP work requirements will be in compliance with federal regulations.

Greta Rymal anticipates that, to the degree a household receiving SNAP benefits already cooperates with applicable TANF or unemployment insurance work requirements, there will not be an economic cost to persons required to comply with the amendments. However, if a household receives TANF benefits or unemployment insurance, as well as SNAP food benefits, and fails to comply with the applicable TANF or unemployment insurance work requirements, the household could potentially lose their SNAP benefits in addition to their TANF benefits. HHSC imposes approximately 2,100 sanctions per month for noncompliance with TANF work requirements. The majority of these clients likely also receive SNAP, but it is unknown how many of these clients are eligible for an exemption from SNAP work requirements.

This proposal will not affect a local economy.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

HHSC has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendments, because the amendments govern an individual's eligibility for SNAP food benefits and do not require businesses to alter their practices.

REGULATORY ANALYSIS

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her private real property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Texas Government Code.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Hilary Davis, Health and Human Services Commission, Policy Strategy, Analysis and Development, MC-2115, 909 West 45th Street, Austin, Texas 78751; or by e-mail to *hilary.davis@hhsc.state.tx.us,* within 30 days after publication of this proposal in the *Texas Register.*

PUBLIC HEARING

A public hearing is scheduled for November 9, 2012, at 1:30 p.m. (central time) in Room 164 of the HHSC-MHMR Center, 909 West 45th Street, Building 2, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Graciela Reyna at (512) 206-4778.

SUBCHAPTER D. APPLICATION PROCESS
DIVISION 1. APPLICATION

1 TAC §372.904

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code §31.001, which authorizes HHSC to administer financial assistance programs (TANF); and Texas Human Resources Code §33.0006, which authorizes HHSC to operate the food stamp program (SNAP).

The amendment affects Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.904. Application Processing Time Frame.

(a) For a TANF application, the Texas Health and Human Services Commission (HHSC) certifies or denies the application by the 45th day after the application file date explained in §372.903 of this division (relating to Application File Date), unless the household is subject to a one-month period of demonstrating cooperation as explained in §372.1155(e) [~~§372.1155(d)~~] of this chapter (relating to Consequence for Noncooperation with Personal Responsibility Agreement Requirements), in which case the application processing period is extended by the time period for demonstrating cooperation.

(b) For a SNAP application, except in the case of an expedited application as described in §372.956 of this subchapter (relating to Expedited SNAP Application Process), HHSC certifies or denies the application as soon as possible but not later than 30 days after the application file date explained in §372.903 of this division. If the 30th day is not a workday, then the processing period ends on the last previous workday.

(c) The first day of the application processing period is the day after the application file date, except as described in subsection (d) of this section.

(d) In SNAP, if an applicant resides in an institution and is also applying for Supplemental Security Income, the first day of the application processing period is the day the applicant is released from the institution, if the day is after the application file date.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6576

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SUBCHAPTER E. PARTICIPATION REQUIREMENTS
DIVISION 2. THE TANF PERSONAL RESPONSIBILITY AGREEMENT (PRA)

1 TAC §372.1155

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code §531.0055, which provides the Executive Commissioner of

HHSC with rulemaking authority; and Texas Human Resources Code §31.001, which authorizes HHSC to administer financial assistance programs (TANF).

The amendment affects Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapter 31. No other statutes, articles, or codes are affected by this proposal.

§372.1155. Consequence for Noncooperation with Personal Responsibility Agreement Requirements.

(a) If a person fails or refuses to cooperate with a requirement of a Personal Responsibility Agreement (PRA) the person signed, the Texas Health and Human Services Commission (HHSC) takes the applicable action described in subsections (b) - (e) [~~(d)~~] of this section, unless the person demonstrates good cause for the noncooperation as explained in §372.1156 of this division (relating to Good Cause for Noncooperation with Personal Responsibility Agreement Requirements).

(b) HHSC stops TANF benefits to a person and to the household for a one-month period or until the person demonstrates cooperation with the requirement of the PRA for which the sanction was imposed, whichever is longer.

(c) If a person fails or refuses to cooperate with either of the requirements described in §372.1154(a) or (g) of this division (relating to Cooperating with Personal Responsibility Agreement Requirements), HHSC denies Medicaid benefits to the person (but not to other members of the household who are receiving Medicaid), unless the person demonstrates to HHSC:

(1) the person is pregnant; or

(2) the person is under age 19.

(d) If a person fails or refuses to cooperate with the requirements described in §372.1154(g) of this division, the person's SNAP benefits will be subject to consequences specified in §372.1352 of this subchapter (relating to Consequences for Noncompliance with SNAP Work Requirements) unless the person is otherwise exempt from SNAP work requirements as specified in 7 CFR §273.7.

(e) [~~(d)~~] If a person fails to cooperate for two consecutive months, HHSC terminates the person's and the household's eligibility for TANF benefits. The person must reapply for TANF benefits and demonstrate cooperation with all PRA requirements that apply to the person for a one-month period before the person or the household may again receive TANF benefits.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas Health and Human Services Commission
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DIVISION 6. WORK

1 TAC §372.1351

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code §33.0006, which authorizes HHSC to operate the food stamp program (SNAP).

The amendment affects Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapter 33. No other statutes, articles, or codes are affected by this proposal.

§372.1351. SNAP Work Requirements.

In SNAP, the Texas Health and Human Services Commission follows 7 CFR §273.7 and requires non-exempt household members to:

(1) register for work;

(2) not voluntarily quit a job or reduce work hours to less than 30 per week, without good cause to do so;

(3) participate in a SNAP Employment and Training Program;

(4) participate in a workfare program;

(5) participate in TANF work activities if also receiving TANF benefits;

(6) participate in Unemployment Insurance work activities if also receiving Unemployment Insurance benefits;

(7) [~~(5)~~] report to an employer; and

(8) [~~(6)~~] accept a bona fide offer of suitable employment.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 5. COMMUNITY AFFAIRS PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §§5.2 - 5.5, 5.7, 5.9 - 5.14, 5.16, 5.17, 5.19 - 5.23

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 5, Subchapter A, §§5.2 - 5.5, 5.7, 5.9 - 5.14, 5.16, 5.17, and 5.19 - 5.22 and new §5.23, concerning General Provisions.

The purpose of the proposed amendments is to enhance the Department's administration of all Community Affairs programs by adding a definition for modified cost reimbursement and renumbering the definition section accordingly; clarification to cost principles and administrative requirements to maintain adequate separation of duties at Subrecipient agencies; moving lobbying prohibitions to the appropriate section; adding detail

to procurement standards, specifically small purchase procurement; capitalizing defined terms for consistency; adding a requirement that the Subrecipient Board authorize the Executive Director or his/her designee authority to enter into contracts; generalizing §5.16 concerning Monitoring of Subrecipients because these duties are now performed by the Department's Compliance Division; strengthening requirements applicable to Subrecipients placed on modified cost reimbursement by the Department; updating income guidelines related to Social Security Income; and updating contact information requirements.

The purpose of the proposed new section is to protect individually identifiable health information of individuals who apply for and receive benefits from Community Affairs programs in accordance with Texas Health and Safety Code, Subtitle I, Chapter 181, Subchapter A.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amendments and new section are in effect, enforcing or administering the amendments and new section does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendments and new section are in effect, the public benefit anticipated as a result of the amendments and new section will be more clarity and simplification of the administration of the Department's Community Affairs programs. There will not be any economic cost to any individuals required to comply with the amendments and new section.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held from October 26, 2012, to November 26, 2012, to receive input on the amendments and new section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941; by email to the following address: cadrulecomments@tdhca.state.tx.us; or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 26, 2012.

STATUTORY AUTHORITY. The amendments and new section are proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules, and Texas Government Code, Chapter 2306, Subchapter E, which authorizes the Department to administer its Community Affairs programs.

The proposed amendments and new section affect no other code, article, or statute.

§5.2. Definitions.

(a) To ensure a clear understanding of the terminology used in the context of the Community Affairs Programs, a list of terms and definitions has been compiled as a reference.

(b) The [~~following~~] words and terms in this chapter shall have the meanings described in this subsection [~~following meaning~~] unless the context clearly indicates otherwise.

(1) CAA--Community Action Agency.

(2) CFR--Code of Federal Regulations.

(3) Children--Household dependents not exceeding eighteen (18) years of age.

(4) Collaborative Application--An application from two or more organizations to provide services to the target population. If a unit of general local government applies for only one organization, this will not be considered a Collaborative Application. Partners in the Collaborative Application must coordinate services and prevent duplication of services.

(5) Community Action Agencies (CAAs)--Local private and public non-profit organizations that carry out the Community Action Program (CAP), which was established [~~founded~~] by the 1964 Economic Opportunity Act to fight poverty by empowering the poor in the United States. Each CAA must have a board consisting of at least one-third elected public officials, not fewer than one-third representatives of low-income individuals and families, chosen in accordance with democratic selection procedures, and the remainder are members of business, industry, labor, religious, law enforcement, education, or other major groups and interests in the community.

(6) Community Action Plan--A plan required by the Community Services Block Grant (CSBG) Act which describes the local (Subrecipient) service delivery system, how coordination will be developed to fill identified gaps in services, how funds will be coordinated with other public and private resources and how the local entity will use the funds to support innovative community and neighborhood based initiatives related to the grant.

(7) Community Affairs Division (CAD)--The Division at the Department that administers CEAP, CSBG, ESGP, ESG, HHSP, Section 8 Housing Choice Voucher Program, and WAP.

(8) The Community Services Block Grant (CSBG)--A grant which provides U.S. federal funding for CAAs and other Eligible Entities [~~eligible entities~~] that seek to address poverty at the community level. Like other block grants, CSBG funds are allocated to the states and other jurisdictions through a formula.

(9) CSBG Act--The CSBG Act is a law passed by Congress authorizing the Community Services Block Grant. The CSBG Act was amended by the Community Services Block Grant Amendments of 1994 and the Coats Human Services Reauthorization Act of 1998 under 42 U.S.C. §§9901, et seq. The CSBG Act [~~act~~] authorized establishing a community services block grant program to make grants available through the program to states to ameliorate the causes of poverty in communities within the states.

(10) Cooling--Modifications including, but not limited to, the repair or replacement of air conditioning units, evaporative coolers, and refrigerators.

(11) CSBG Subrecipient--Includes CSBG Eligible Entities [~~eligible entities~~] and other organizations that are awarded CSBG funds.

(12) Department--The Texas Department of Housing and Community Affairs.

(13) Discretionary Funds--Those CSBG funds maintained in reserve by a state [~~State~~], at its discretion, for CSBG allowable uses as authorized by §675C of the CSBG Act, and not designated for distribution on a statewide basis to CSBG Eligible Entities [~~eligible entities~~] and not held in reserve for state administrative purposes.

(14) DOE--The United States Department of Energy.

(15) DOE WAP Rules--10 CFR Part 440 describes the Weatherization Assistance for Low Income Persons as administered through the Department of Energy.

(16) Dwelling Unit--A house, including a stationary mobile home, an apartment, a group of rooms, or a single room occupied as separate living quarters. This definition does not apply to the ESG or HHSP.

(17) Equipment--A tangible non-expendable personal property including exempt property, charged directly to the award, having a useful life of more than one year, and an acquisition cost of $5,000 or more per unit. For CSBG, CEAP, and WAP, if the unit acquisition cost exceeds $5,000, approval from the Department's Community Affairs Division must be obtained before the purchase takes place. For ESGP, if the unit acquisition cost exceeds $500, approval from the Department's Community Affairs Division must be obtained before the purchase is made.

(18) Elderly Person--A person who is sixty (60) years of age or older.

(19) Electric Base-Load Measure--Weatherization measures which address the energy efficiency and energy usage of lighting and appliances.

(20) Eligible Entity--Those local organizations in existence and designated by the federal government to administer programs created under the federal Economic Opportunity Act of 1964. This includes community action agencies, limited-purpose agencies, and units of local government. The CSBG Act defines an eligible entity as an organization that was an eligible entity on the day before the enactment of the Coats Human Services Reauthorization Act of 1998 (October 27, 1998), or is designated by the Governor to serve a given area of the state [~~State~~] and that has a tripartite board or other mechanism specified by the state for local governance.

(21) Emergency--Defined by the LIHEAP Act of 1981 (Title XXVI of the Omnibus Budget Reconciliation Act of 1981, 42 U.S.C. §8622):

(A) natural disaster;

(B) a significant home energy supply shortage or disruption;

(C) significant increase in the cost of home energy, as determined by the Secretary;

(D) a significant increase in home energy disconnections reported by a utility, a state [~~State~~] regulatory agency, or another agency with necessary data;

(E) a significant increase in participation in a public benefit program such as the food stamp program carried out under the Food Stamp Act of 1977 (7 U.S.C. §§2011, et seq.), the national program to provide supplemental security income carried out under Title XVI of the Social Security Act (42 U.S.C. §§1381, et seq.) or the state [~~State~~] temporary assistance for needy families program carried out under Part A of Title IV of the Social Security Act (42 U.S.C. §§601, et seq.), as determined by the head of the appropriate federal agency;

(F) a significant increase in unemployment, layoffs, or the number of Households [~~households~~] with an individual applying for unemployment benefits, as determined by the Secretary of Labor; or

(G) an event meeting such criteria as the Secretary, at the discretion of the Secretary, may determine to be appropriate.

(H) This definition does not apply to ESGP, ESG, or HHSP.

(22) Emergency Shelter Grants Program (ESGP)--A federal grant program established by the Homeless Housing Act of 1986 and incorporated into Title IV of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. §§11371 - 11378) and funded through HUD.

(23) Emergency Solutions Grants (ESG)--A federal grant program authorized in Title IV of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. §§11371 - 11378), as amended by the Homeless Emergency Assistance and Rapid Transition to Housing Act (HEARTH Act). ESG is funded through HUD.

(24) Energy Audit--The energy audit software and procedures used to determine the cost effectiveness of weatherization measures to be installed in a dwelling unit.

(25) Energy Repairs--Weatherization-related [~~Weatherization related~~] repairs necessary to protect or complete regular weatherization energy efficiency measures.

(26) Families with Young Children--A family that includes a child age five (5) or younger.

(27) High Energy Burden--Determined by dividing a Household's [~~household's~~] annual home energy costs by the Household's [~~household's~~] annual gross income. The percentage at which energy burden is considered high is defined by data gathered from the State Data Center.

(28) High Energy Consumption--Household energy expenditures exceeding the median of low-income home energy expenditures expressed in the data collected from the State Data Center.

(29) Homeless or homeless individual--An individual as defined by 42 U.S.C. §§11371 - 11378 and 24 CFR §576.2.

(30) Homeless and Housing Services Program (HHSP)--A state funded program established by the State Legislature during the 81st Legislative session with the purpose of providing funds to local programs to prevent and eliminate homelessness in municipalities with a population of 285,500 or more.

(31) Household--Any individual or group of individuals who are living together as one economic unit. For energy programs, these persons customarily purchase residential energy in common or make undesignated payments for energy.

(32) Inverse Ratio of Population Density Factor--The number of square miles of a county divided by the number of poverty Households [~~households~~] of that county.

(33) Local Units of Government--City, county, council of governments, and housing authorities.

(34) Low Income--Income in relation to family size:

(A) For DOE WAP, at or below 200% of the Income guidelines;

(B) For CEAP, CSBG, and LIHEAP WAP at or below 125% of the Income guidelines;

(C) For ESGP, at or below 100% of the poverty level, determined in accordance with criteria established by the Director of the Office of Management and Budget;

(D) For ESG, 30% of the Area Median Income (AMI) as defined by HUD for persons receiving prevention assistance; and

(E) For HHSP, 50% of the AMI as defined by HUD for persons receiving emergency essential services, essential services, and emergency intervention assistance.

(35) Low Income Home Energy Assistance Program (LIHEAP)--A federally funded block grant program that is implemented to serve low income Households [~~households~~] who seek assistance for their home energy bills and/or weatherization services.

(36) Migrant Farm worker--An individual or family that is employed in agricultural labor or related industry and is required to be absent overnight from their permanent place of residence.

(37) Modified Cost Reimbursement--A contract sanction whereby reimbursement of costs incurred by the Subrecipient is made only after the Department has reviewed and approved backup documentation provided by the Subrecipient to support such costs.

(38) [~~(37)~~] Multifamily Dwelling Unit--A structure containing more than one dwelling unit. This definition does not apply to ESGP, ESG, or HHSP.

(39) [~~(38)~~] National Performance Indicator--An individual measure of performance within the Department's reporting system for measuring performance and results of Subrecipients of funds. There are currently twelve indicators of performance which measure self-sufficiency, family stability, and community revitalization.

(40) [~~(39)~~] Needs Assessment--An assessment of community needs in the areas to be served with CSBG funds. The assessment is a required part of the Community Action Plan per Assurance 11 of the CSBG Act.

(41) [~~(40)~~] OMB--Office of Management and Budget, a federal agency.

(42) [~~(41)~~] OMB Circulars--OMB circulars set forth principles and standards for determining costs for federal awards and establishes consistency in the management of grants for federal funds. Cost principles for local governments are set forth in Office of Management and Budget (OMB) Circular A-87, and for non-profit organizations in OMB Circular A-122. Uniform administrative requirements for local governments are set forth in OMB Circular A-102, and for non-profits in OMB Circular A-110. OMB Circular A-133 "Audits of States, Local Governments, and Non-Profit Organizations," provides audit standards for governmental organizations and other organizations expending federal funds. The single audit requirements are set forth under OMB Circular A-133.

(43) [~~(42)~~] Outreach--The method that attempts to identify clients who are in need of services, alerts these clients to service provisions and benefits, and helps them use the services that are available. Outreach is utilized to locate, contact and engage potential clients.

(44) [~~(43)~~] Performance Statement--A document which identifies the services to be provided by a CSBG Subrecipient. The document is an attachment to the CSBG contract entered into by the Department and the CSBG Subrecipient.

(45) [~~(44)~~] Persons with Disabilities--Any individual who is:

(A) a handicapped individual as defined in §7(9) of the Rehabilitation Act of 1973;

(B) under a disability as defined in §1614(a)(3)(A) or §223(d)(1) of the Social Security Act or in §102(7) of the Developmental Disabilities Services and Facilities Construction Act; or

(C) receiving benefits under 38 U.S.C. Chapter 11 or 15.

(46) [~~(45)~~] Population Density--The number of persons residing within a given geographic area of the state.

(47) [~~(46)~~] Poverty Income Guidelines--The official poverty income guidelines as issued by the U.S. Department of Health and Human Services annually.

(48) [~~(47)~~] Private Nonprofit Organization--An organization described in §501(c) of the Internal Revenue Code (the "Code") of 1986 and which is exempt from taxation under subtitle A of the Code, has an accounting system and a voluntary board, and practices nondiscrimination in the provision of assistance [~~which has status as a §501(c) tax-exempt entity~~]. Private nonprofit organizations applying for ESGP, ESG and HHSP funds must be established for charitable purposes and have activities that include, but are not limited to, the promotion of social welfare and the prevention or elimination of homelessness. The entity's net earnings may not inure to the benefit of any individual(s).

(49) [~~(48)~~] Public Organization--A unit of local government, as established by the Legislature of the State of Texas. Includes, but may not be limited to, cities, counties, and councils of governments.

(50) [~~(49)~~] Referral--The process of providing information to a client Household [~~household~~] about an agency, program, or professional person that can provide the service(s) needed by the client.

(51) [~~(50)~~] Rental Unit--A dwelling unit occupied by a person who pays rent for the use of the dwelling unit. This definition does not apply to ESGP, ESG, or HHSP.

(52) [~~(51)~~] Renter--A person who pays rent for the use of the dwelling unit. This definition does not apply to ESGP, ESG, or HHSP.

(53) [~~(52)~~] Seasonal Farm Worker--An individual or family that is employed in seasonal or temporary agricultural labor or related industry and is not required to be absent overnight from their permanent place of residence. In addition, at least 20% of the Household [~~household~~] annualized income must be derived from the agricultural labor or related industry.

(54) [~~(53)~~] Secretary--Chief Executive of the U.S. Department of Health and Human Services.

(55) [~~(54)~~] Service--The provision of work or labor that does not produce a tangible commodity.

(56) [~~(55)~~] Shelter--Defined by the Department as a dwelling unit or units whose principal purpose is to house on a temporary basis individuals who may or may not be related to one another and who are not living in nursing homes, prisons, or similar institutional care facilities.

(57) [~~(56)~~] Single Family Dwelling Unit--A structure containing no more than one dwelling unit. This definition does not apply to ESGP, ESG, or HHSP.

(58) [~~(57)~~] Social Security Act--42 U.S.C. §§601, et seq., CSBG works with activities carried out under Title IV Part A to assist families to transition off of state programs.

(59) [~~(58)~~] State--The State of Texas or the Texas Department of Housing and Community Affairs.

(60) [~~(59)~~] Subcontractor--A person or an [~~An~~] organization with whom the Subrecipient contracts with to administer programs.

(61) [~~(60)~~] Subrecipient--Generally, an organization [~~According to each program subchapter, Subrecipient may be defined as organizations~~] with whom the Department contracts [~~with~~] and provides CSBG, ESGP, CEAP, ESG, HHSP, DOE WAP, or LIHEAP funds. (Refer to Subchapters B, C, D - G, J, and K of this chapter for program specific definitions.)

(62) [~~(61)~~] Supplies--All personal property excluding equipment, intangible property, and debt instruments, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement (subject inventions), as defined in 37 CFR Part 401, "Rights to Inventions Made by Non-profit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements."

(63) [~~(62)~~] TAC--Texas Administrative Code.

(64) [~~(63)~~] Targeting--Focusing assistance to Households [~~households~~] with the highest program applicable needs.

(65) [~~(64)~~] Terms and Conditions--Binding provisions provided by a funding organization to grantees accepting a grant award for a specified amount of time.

(66) [~~(65)~~] Treatment as a State or Local Agency--For purposes of 5 U.S.C. Chapter 15, any entity that assumes responsibility for planning, developing, and coordinating activities under the CSBG Act and receives assistance under CSBG Act shall be deemed to be a state or local agency.

(67) [~~(66)~~] Units of General Local Government--A unit of local government which has, among other responsibilities, the authority to assess and collect local taxes and to provide general governmental services.

(68) [~~(67)~~] U.S.C.--United States Code.

(69) [~~(68)~~] USDHHS/HHS--U.S. Department of Health and Human Services.

(70) [~~(69)~~] USHUD/HUD--U.S. Department of Housing and Urban Development.

(71) [~~(70)~~] Vendor Agreement--An agreement between the Subrecipient and energy vendors that contains assurance as to fair billing practices, delivery procedures, and pricing for business transactions involving LIHEAP beneficiaries.

(72) [~~(71)~~] WAP--Weatherization Assistance Program.

(73) [~~(72)~~] WAP PAC--Weatherization Assistance Program Policy Advisory Council. The WAP PAC was established by the Department in accordance with 10 CFR §440.17 to provide advisory services in regards to the WAP program.

(74) [~~(73)~~] Weatherization Material--The material listed in Appendix A of 10 CFR Part 440.

(75) [~~(74)~~] Weatherization Project--A project conducted in a single geographical area which undertakes to reduce heating and cooling demand of dwelling units that are energy inefficient.

§5.3. Cost Principles and Administrative Requirements.

(a) Except as expressly modified by the terms of a contract, Subrecipients shall comply with the cost principles and uniform administrative requirements set forth in the Uniform Grant and Contract Management Standards, 34 TAC §§20.421, et seq. (the "Uniform Grant Management Standards") provided, however, that all references therein to "local government" shall be construed to mean Subrecipient. Nonprofit Subrecipients of ESGP, ESG, and DOE WAP do not have to comply with UGMS unless otherwise required by NOFA or contract. For federal funds, Subrecipients will follow OMB Circulars as interpreted by the federal funding agency.

(b) In order to maintain adequate separation of duties, no more than two of the functions described in paragraphs (1) - (5) of this subsection are to be performed by a single individual:

(1) Requisition authorization;

(2) Encumbrance into software;

(3) Check creation and/or automated payment disbursement;

(4) Authorized signature/electronic signature; and

(5) Distribution of paper check.

§5.4. Prohibitions.

[~~(a) Pursuant to the Office of Management and Budget (OMB) Circular A-122, "Cost Principles for Non-Profit Organizations," specifically §25 titled "Lobbying," costs associated with lobbying are unallowable.~~]

[~~(b) Section 678(F)(b)(2) of the Community Services Block Grant (CSBG) Act prohibits the use of program funds for political activity, voter registration activity or voter registration. The Hatch Act, 5 U.S.C. Chapter 15 and the amendments to the Hatch Act and the repeal of §675(c) and §675(C)(6) of the CSBG Act do not affect the prohibition of §678(F)(b)(2).~~]

(a) [~~(c)~~] Knowingly hiring an undocumented worker is prohibited pursuant to[~~,~~] 8 U.S.C. §1324a.

(b) [~~(d)~~] Discrimination is prohibited.

(1) Civil Rights Act of 1964 (42 U.S.C. §§2000, et seq.), Age Discrimination Act of 1975 (42 U.S.C. §§6101, et seq.), Rehabilitation Act of 1973 (29 U.S.C. §794), and Title II of the Americans with Disabilities Act of 1990 (42 U.S.C. §§12131, et seq.) shall apply to all programs or activities administered by Subrecipients including the nondiscrimination provisions of the CSBG (42 U.S.C. §§9901, et seq.).

(2) All Subrecipients receiving federal funds must be equal opportunity employers and render services without regard to race, color, religion, sex, familial status, national origin, age, disability, political affiliation or belief. Information on equal opportunity and nondiscrimination shall be made available to participants, employees, Subcontractors [~~subcontractors~~], and interested parties.

§5.5. [~~Certificate and Disclosure Regarding~~] Lobbying Activities.

(a) Subrecipients of federal funding, including those who receive federal funds through the Department, are subject to the anti-lobbying provisions commonly referred to as "the Byrd Amendments" (31 U.S.C. §1352). The legislation imposes certain requirements for disclosure and certification on recipients of federal contracts, grants, cooperative agreements, and loans, including the requirement that each recipient of a federal contract in excess of $100,000 must complete the Standard Form-LLL "Disclosure of Lobbying Activities" form.

(b) A §501(c)(3) nonprofit organization which pays any person funds from any source (even non-federal funds) to lobby Congress or which pays an employee of any federal agency in connection with this grant, must complete the "Disclosure of Lobbying Activities" form available on the U.S. Department of Health and Human Services (USDHHS) website. A completed form must be submitted to the Department prior to engaging in lobbying activities. The Subrecipient [~~subrecipient~~] must also file quarterly updates about its employment of lobbyists if material changes occur in the organization's use of lobbyists.

(c) For each contract, grant, cooperative agreement, or loan in excess of $100,000, the Subrecipient [~~subrecipient~~] must complete the "Certification Regarding Lobbying" form and return it to the Department. This form is located on the USDHHS website. By completing the certification, the Subrecipient [~~subrecipient~~] verifies that no federally appropriated funds have been used to lobby the United States Congress in connection with the awarding or modifying of a federal contract, loan, cooperative agreement or grant.

(d) Pursuant to the 1996 Simpson-Craig Amendment to the Lobbying Disclosure Act, 2 U.S.C. §1611, §501(c)(4) non-profit organizations, typically civic leagues or employee associations, may not receive any federal funding if such organizations engage in lobbying. The law establishes civil penalties for noncompliance, with possible penalties ranging from $10,000 to $100,000.

(e) Pursuant to the Office of Management and Budget (OMB) Circular A-122, "Cost Principles for Non-Profit Organizations," specifically §25 titled "Lobbying," costs associated with lobbying are unallowable.

§5.7. Fidelity Bond Requirements.

The Department is required to assure that fiscal control and accounting procedures for federally funded entities will be established to assure the proper disbursal and accounting for the federal funds paid to the state (A-110 "Administrative Requirements for Grants to Non-Profits"). In compliance with that assurance the Department requires program Subrecipients [~~subrecipients~~] to maintain adequate fidelity bond coverage. A fidelity bond is a bond indemnifying the Subrecipient [~~subrecipient~~] against losses resulting from the fraud or lack of integrity, honesty or fidelity of one or more of its employees, officers, or other persons holding a position of trust.

(1) In administering program contracts, Subrecipients [~~subrecipients~~] shall observe their regular requirements and practices with respect to bonding and insurance. In addition, the Department may impose bonding and insurance requirements by contract.

(2) If a Subrecipient [~~subrecipient~~] is a non-governmental organization, the Department requires an adequate fidelity bond. If the amount of the fidelity bond is not prescribed in the contract, the fidelity bond must be for a minimum of $10,000 or an amount equal to the contract if less than $10,000. The bond must be obtained from a company holding a certificate of authority to issue such bonds in the State of Texas.

(3) The fidelity bond coverage must include all persons authorized to sign or counter-sign checks or to disburse sizable amounts of cash. Persons who handle only petty cash (amounts of less than $250) need not be bonded, nor is it necessary to bond officials who are authorized to sign payment vouchers, but are not authorized to sign or counter-sign checks or to disburse cash.

(4) The Department must receive written assurance from the Subrecipient [~~subrecipient~~] that the required fidelity bond has been established. The assurance letter must be received from the bonding company or agency stating the type of bond, the amount and period of coverage, the positions covered, and the annual cost of the bond. Compliance must be continuously maintained thereafter. A copy of the actual policy shall remain on file with the Subrecipient [~~subrecipient~~] and shall be subject to monitoring by the Department.

(5) Subrecipients are responsible for filing claims against the fidelity bond when a covered loss is discovered. The Department may take any one or more of the [~~following~~] actions described in subparagraphs (A) - (D) of this paragraph for noncompliance.

(A) Deny Subrecipient's [~~subrecipient's~~] requests for advances and place the Subrecipient [~~subrecipient~~] on a Modified Cost Reimbursement [~~cost reimbursement~~] plan until written assurance of compliance is received by the Department.

(B) Withhold Subrecipient [~~subrecipient~~] payments (either reimbursement or advance) until written assurance of compliance is received by the Department.

(C) Suspend performance of the contract until written assurance of compliance is received by the Department.

(D) Contract termination.

§5.9. Travel.

The governing body [~~board~~] of each Subrecipient [~~subrecipient~~] must adopt and submit to the Department approved travel policies that adhere to Office of Management and Budget (OMB) Circulars A-87, A-110, A-122, for cost allowability. The Subrecipient [~~subrecipient~~] must follow either the federal travel regulations or State of Texas travel rules and regulations found on the Comptroller of Public Accounts website at www.cpa.state.tx.us. If the travel policy and procedures are revised they must be submitted to the Department.

§5.10. Procurement Standards.

(a) In addition to the requirements described in §5.3 of this chapter (relating to Cost Principles and Administrative Requirements), Subrecipients who administer Community Services Block Grant (CSBG), Homeless Housing and Services Program (HHSP), and Low Income Housing Energy Assistance Program (LIHEAP) [~~entities~~] must follow the requirements in Texas Government Code, Chapter 783.

(b) Additional Department requirements are:

(1) Small purchase procedures:

(A) This procedure may be used only on those services, supplies, or equipment costing in the aggregate of $25,000 or less. For Emergency Shelter Grant Program (ESGP), Emergency Solutions Grant (ESG), and the HHSP [~~Homeless Housing and Services Program (HHSP)~~], the threshold is $500 or less [~~and more per unit~~];

(B) Subrecipient must establish a clear, accurate description of the specifications for the technical requirements of the material, equipment, or services to be procured; [~~and~~]

(C) Subrecipient must obtain a written price or documented rate quotation from an adequate number of qualified sources. An adequate number is, at a minimum, three different sources; and [~~.~~]

(D) For a Comprehensive Energy Assistance Program (CEAP), CSBG, or Weatherization Assistance Program (WAP), small purchase procurement that exceeds $500 in the aggregate, and for any single item purchase for any program that exceeds $250, Subrecipients must obtain three (3) written quotes that contain a clear and accurate description of the material product or services to be provided. For any procurement that does not exceed these stated amounts, written documentation of phone quotes is acceptable.

(2) For Sealed bids:

(A) Subrecipient must formally advertise, for a minimum of three (3) days, in newspapers or through notices posted in public buildings throughout the service area. Advertising beyond the Subrecipient's service area is allowable and recommended by the Department. The advertisement should include, at a minimum, a response time of fourteen (14) days prior to the closing date of the bid request. A Government Entity must comply with the statutorily imposed publication requirements in addition to those requirements stated herein; and

(B) When advertising for material or labor services, Subrecipient shall indicate a period for which the materials or services are sought (e.g. for a one-year contract with an option to renew for an additional four (4) years). This advertised time period shall determine the length of time which may elapse before re-advertising for material or labor services, except that advertising for labor services must occur at least every five (5) years.

(3) For Competitive proposals:

(A) The Request for Proposal (RFP) or Request for Qualification (RFQ) must be publicized. The preferred method of advertising is the local service area newspapers. This advertisement should, at a minimum, allow fourteen (14) days before the RFP or RFQ is due. The due date must be stated in the advertisement; and

(B) The time period for services shall be one year, plus four (4) additional years at a maximum.

(4) Non-competitive proposals may be used only if:

(A) The service, supply, or equipment is available only from a single source;

(B) A public emergency exists preventing the time required for competitive solicitation; or [and]

(C) After solicitation of a number of sources, competition is determined inadequate.

(5) Contract [Required contract] provisions, including subcontracts shall include the [following contract] provisions or conditions described in subparagraphs (A) - (G) of this paragraph [in procurement contracts or subcontracts]:

(A) Contracts in excess of $25,000 shall include [contractual] provisions or conditions that allow for administrative, contractual, or legal remedies in instances where Subcontractors [subcontractors] violate or breach the contract terms, and provide for such remedial actions as may be appropriate;

(B) All contracts in excess of $25,000 shall include suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the Subrecipient;

(C) Contracts shall include a provision with regard to independent Subcontractor [subcontractor] status, and a provision to hold harmless and indemnify the Subrecipient from and against any and all claims, demands and course of action asserted by any third party arising out of or in connection with the services to be performed under contract;

(D) Contracts shall include a provision regarding conflicts [conflict] of interest. Subrecipient's employees, officers, and/or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from Subcontractors [subcontractors], or potential Subcontractors [subcontractors]; and

(E) Contracts shall include a provision prohibiting and requiring the reporting of [to prevent] fraud, waste, and abuse.

(i) Subrecipient shall establish, maintain, and utilize internal control systems and procedures sufficient to prevent, detect, and correct incidents of waste, fraud, and abuse in all Department funded programs and to provide for the proper and effective management of all program and fiscal activities funded by this contract. Subrecipient's internal control systems and all transactions and other significant events must be clearly documented and the documentation made readily available for review by Department.

(ii) Subrecipient shall give Department complete access to all of its records, employees, and agents for the purpose of monitoring or investigating the program. Subrecipient shall fully cooperate with Department's efforts to detect, investigate, and prevent waste, fraud, and abuse. Subrecipient shall immediately notify the Department of any identified instances of waste, fraud, or abuse.

(iii) Department will notify the funding source upon identification of possible instances of waste, fraud, and abuse or other serious deficiencies.

(iv) Subrecipient may not discriminate against any employee or other person who reports a violation of the terms of this contract or of any law or regulation to Department or to any appropriate law enforcement authority, if the report is made in good faith.

(F) Contracts shall include a provision to the effect that any alterations, additions, or deletions to the terms of the contract which are required by changes in federal law and regulations or state statute are automatically incorporated into the contract without written [and administrative code] amendment [hereto], and shall become effective on the date designated by such law and or regulation; and any other alterations, additions, or deletions to the terms of the contract shall be amended hereto in writing and executed by both parties to the contract.

(G) Contracts shall include the provisions described in clauses (i) - (iii) of this subparagraph: [following provision assuring legal authority to sign the contract.]

(i) Subcontractor represents that it possesses [the practical ability and the] legal authority to enter into the contract, receive and manage the funds authorized by the contract, and to perform the services Subcontractor [subcontractor] has obligated itself to perform under the contract;[.]

(ii) The person signing the contract on behalf of the Subcontractor [subcontractor] warrants that he/she has been authorized by the Subcontractor [subcontractor] to execute the contract on behalf of the Subcontractor [subcontractor] and to bind the Subcontractor [subcontractor] to all terms set forth in the contract; and[.]

(iii) Department shall have the right to suspend or terminate the contract if there is a dispute as the legal authority of either the Subcontractor [subcontractor] or the person signing the contract to enter into the contract or to render performances thereunder. Should such suspension or termination occur, the Subcontractor [subcontractor] is liable to the Subrecipient for any money it has received for performance of provisions of the contract.

§5.11. Procurement/Cooperative Purchasing Program.

The State of Texas conducts procurement for many materials, goods, and appliances. The State of Texas procurement process complies with the required procurement provisions. For more detail about how to purchase from the state [State] contract, please contact: State of Texas Co-Op Purchasing Program, Texas Comptroller of Public Accounts, Web address: http://www.window.state.tx.us/procurement/prog/coop/; e-mail: coop@cpa.state.tx.us; phone number: (512) 463-3368. If Subrecipients [subrecipients] choose to use the Cooperative Purchasing Program, [they will need] documentation of annual fee payment is required.

§5.12. Purchases.

Purchases of personal property, equipment, goods or services with a unit acquisition cost of over $5,000 for Community Services Block Grant (CSBG), Comprehensive Energy Assistance Program (CEAP), and Weatherization Assistance Program (WAP), and over $500 [or greater] for Emergency Shelter Grant Program (ESGP), Emergency Solutions Grants Program (ESG) and Homeless Housing and Services Program (HHSP) require prior written approval from the TDHCA Community Affairs Division before the purchase can take place.

§5.13. Bonding Requirements.

(a) The [following] requirements described in this subsection relate only to construction or facility improvements.

(1) For contracts exceeding $100,000 the Department may accept the bonding policy and requirements of the Subrecipient, provided the Department has made a written finding that the Department is adequately protected.

(2) For contracts in excess of $100,000, and for which the Subrecipient cannot make a determination that the Department's interest is adequately protected, a "bid guarantee" from each bidder equivalent to 5% of the bid price shall be requested. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified. A bid bond in the form of any [~~all~~] of the documents described in this paragraph [~~following~~] may be accepted as [~~represent~~] a "bid guarantee."

(A) A performance bond on the part of the Subrecipient for 100% of the contract price. A "performance bond" is one executed in connection with a contract, to secure fulfillment of all Subcontractors' [~~subcontractors'~~] obligations under such contract.

(B) A payment bond on the part of the Subcontractor [~~subcontractor~~] for 100% of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(C) Where bonds are required, in the situations described herein, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR Part 223, "Surety Companies Doing Business with the United States."

(b) A Government Entity must comply with the bond requirements of Texas Civil Statutes, Articles 2252, 2253, and 5160, and Local Government Code, §252.044 and §262.032, as applicable.

§5.14. Subrecipient Contract.

(a) Upon Board approval, the Department [~~Department's Executive Director~~] and Subrecipient [~~subrecipients~~] shall enter into an [~~and execute an~~] agreement for the receipt of funds. The Department, acting by and through its Executive Director or his/her designee, may authorize, execute, and deliver authorized modifications and/or amendments to the contract.

(b) The governing body of the Subrecipient must pass a resolution authorizing its Executive Director or his/her designee to have signature authority to enter into contracts, sign amendments, and review and approve reports. All contract actions including extensions, amendments or revisions must be ratified by the governing body at the next regularly scheduled meeting. Minutes relating to this resolution must be on file at the Subrecipient level.

(c) [~~(b)~~] Within sixty (60) days following the conclusion of a contract issued by the Department, the Subrecipient [~~subrecipient~~] shall provide a full accounting of funds expended under the terms of the contract.

(d) [~~(c)~~] Failure of a Subrecipient [~~subrecipient~~] to provide an accounting of funds expended under the terms of the contract may be sufficient reason for the Department to deny any future contract to the Subrecipient [~~subrecipient~~].

§5.16. Monitoring and Single Audit Requirement [~~of Subrecipients~~].

(a) The Department or its designee may conduct on and off-site monitoring and evaluation of Subrecipient's compliance with state or federal requirements. The Department's monitoring may include a review of the efficiency, economy, and effectiveness of Subrecipient's performance. The Department will notify Subrecipient in writing of any deficiencies noted during such monitoring. The Department may provide training and technical assistance to Subrecipient in correcting the deficiencies noted. The Department may require corrective action to remedy deficiencies noted in Subrecipient's accounting, personnel, procurement, and management procedures and systems in order to comply with state or federal requirements.

(b) Copy of the most recent Single Audit Report--Organizations that expend more than the expenditure threshold under OMB Circular A-133 must have a single audit conducted for that year (A-133 Subpart B.200). Organizations that do not exceed the expenditure threshold under OMB Circular A-133 are exempt from the single audit requirements. If an organization is not required to have a single audit performed, the organization must provide the end-of-the-year financial statements (balance sheet, income statement, and statement of cash flow).

[~~(a) The Department's Compliance Division is responsible for ensuring that the program activities are completed and that the funds are expended in accordance with the contract provisions and applicable State and Federal rules, regulations, policies, and related statutes. In order to ensure such, the Department will conduct monitoring reviews of the Subrecipients to evaluate the effectiveness of the Subrecipient's performance and program compliance through on-site and desk monitoring as described in §5.15 of this chapter (relating to Federal Funding Accountability and Transparency Act (FFATA)) following the requirements of §678B of PL 105-285 Subtitle B, §2605(B)(10) of PL 97-35, as amended, 10 CFR §440.23(d), and 24 CFR §576.61 and §576.57(f) and (g), respectively.~~]

[~~(1) The Department employs a Subrecipient monitoring procedure that is based upon an assessment of associated risks. The factors may include but are not limited to the status of the most recent monitoring report, timeliness of grant reporting, results of the last on-site monitoring review, number and funding amount of Department funded contracts, final expenditure rate, and single audit status or other factors. Ranking of Subrecipients will determine whether an on-site review or a desk review is completed unless Department management determines an on-site review is needed.~~]

[~~(2) The Department may conduct unannounced on-site monitoring reviews of a Subrecipient identified as at risk for contract termination, if deficiencies identified from prior monitoring activities persist or remain unresolved for an unreasonable period of time. In the event of reports of fraud and abuse or other extenuating circumstances the Department may make an unannounced on-site monitoring review.~~]

[~~(3) Follow-up reviews may be performed to ensure implementation of corrective action of Subrecipients that failed to meet the goals, standards, and requirements established by the Department.~~]

[~~(4) Technical assistance and training will be provided to the Subrecipient to address program deficiencies.~~]

[~~(5) A monitoring instrument is used to perform monitoring reviews. Support documentation is retained by the Department to verify: the achievement of performance goals; conduct of eligible activities; and compliance with other contractual regulatory provisions and financial accountability. Monitoring reviews of Subrecipients also include reviewing annual financial reports and any related management letters and financial documents.~~]

[~~(6) Following the onsite monitoring review, a monitoring report is prepared and submitted to the Subrecipient outlining any administrative, program, and financial deficiencies. The monitoring report also includes notes, recommended improvements, corrective actions or a corrective action plan. Subrecipients must respond to the monitoring report within forty-five (45) calendar days from the date of~~

the monitoring report except for WAP Subrecipients whom must respond within thirty (30) calendar days.]

[(A) Finding--The written description of a deficient condition which is significantly substandard according to the monitoring standards. Findings may also be deficiencies found with regard to compliance with program rules, required cost principles, federal, state and/or local laws, and generally accepted accounting procedures or Generally Accepted Accounting Principles. In general, findings require corrective action to create an acceptable level of risk for disbursement of funds. The description of a finding might include the cause and effect of the deficient condition.]

[(B) Recommended Improvement--Suggested best practice(s) to enhance program, operational, financial, or administrative practices.]

[(C) Note--An explanatory tool to further describe and clarify findings or recommended improvements. A note may also be used to include additional information related to the monitoring review but not related to a finding or recommended improvement.]

[(7) Subrecipients are required to have at a minimum the following documents available, and any other requested documents, for the monitoring review:]

[(A) Roster of staff (name, title, salary and status);]

[(B) Current agency organization chart;]

[(C) List of Board of Directors to include: names, addresses and telephone numbers, tenure on the board, section represented by the board member, list of committees--CSBG, ESGP, ESG, and HHSP;]

[(D) Board election/selection materials--CSBG;]

[(E) Board minutes (previous six meetings) and attendance roster--CSBG, ESGP, ESG, and HHSP;]

[(F) List of neighborhood centers with names of staff--CSBG and CEAP;]

[(G) Personnel policies;]

[(H) Bylaws--CSBG, ESGP, ESG, and HHSP;]

[(I) Travel policies and records;]

[(J) Chart of accounts;]

[(K) Accounting records (journals/ledgers) and support documentation;]

[(L) Amount of Cash on Hand (at time of monitoring);]

[(M) Bank reconciliation records;]

[(N) Agency's proof of fidelity bond coverage;]

[(O) Documentation of match requirements--ESGP, ESG, and when applicable for HHSP;]

[(P) Closeout data for prior program year--CEAP and WAP;]

[(Q) Access to client files and documentation of performance;]

[(R) Income documentation;]

[(S) Appeals Procedures--CEAP, ESG, ESGP, and WAP;]

[(T) Subcontract agreements with appropriate procurement packages (if applicable);]

[(U) Procurement policy;]

[(V) Documentation of current contract inventory;]

[(W) Documentation of coordination with other local programs (including contact person and phone numbers)--CSBG;]

[(X) Copies of most recent monitoring reports and/or performance reviews of all programs administered by the organization;]

[(Y) Copy of the most recent Single Audit Report--Organizations that expend more than the expenditure threshold under OMB Circular A-133 must have a single audit conducted for that year (A-133 Subpart B.200). Organizations that do not exceed the expenditure threshold under OMB Circular A-133 are exempt from the single audit requirements. If an organization is not required to have a single audit performed, the organization must provide the end-of-the-year financial statements (balance sheet, income statement, and statement of cash flow); and]

[(Z) If applicable, documentation of the most recent Head Start Onsite Monitoring Document review, including results, responses, and current status--CSBG.]

(c) [(b)] Subrecipients not exempt from the single audit requirements are responsible for submitting their Single Audit Report within thirty (30) days of completion of their audit and no later than nine (9) months after the end of the audit period (fiscal year end) to the Department's Compliance Division [as well as to the Community Affairs (CA) Division]. Refer to 31 U.S.C. §7502.

(d) Subrecipient shall make audit report available for public inspection within thirty (30) days after receipt of the audit reports.

(e) Subrecipient shall submit such audit report to the federal clearinghouse designated by OMB in accordance with OMB A-133.

[(c) Monitoring reviews of Subrecipients will include a review of the Subrecipient's annual financial reports and any related management letters and financial documents.]

§5.17. Sanctions and Contract Close Out.

(a) Subrecipients that enter [have entered] into a contract with the Department to administer programs are required to follow state and federal laws and regulations and rules governing these programs.

(b) If a Subrecipient fails to comply with program requirements, rules, or regulations and in the event monitoring or other reliable sources reveal material deficiencies in performance, or if the Subrecipient fails to correct any deficiency within the time allowed by federal or state law, the Department will apply one or more of the [following] sanctions described in paragraph (1)(A) - (E) of this subsection:

(1) Deny the Subrecipient's requests for advances and place it on a Modified Cost Reimbursement [cost reimbursement] method of payment until proof of compliance with the rules and regulations are received by the Department;

(A) Subrecipients placed on a Modified Cost Reimbursement method of payment must comply with the reporting requirements outlined in §5.211 of this chapter (relating to Subrecipient Reporting Requirements); §5.311 of this chapter (relating to Reports); §5.406 of this chapter (relating to Subrecipient Reporting Requirements); §5.506 of this chapter (relating to Subrecipient Reporting Requirements); §5.1006 of this chapter (relating to Performance and Expenditure Benchmarks); and §5.2007 of this chapter (relating to Reporting), as applicable;

(B) Subrecipients on a Modified Cost Reimbursement method must provide all supporting documentation to the Department no later than seven (7) days after the reporting due date;

(C) If Subrecipient has not submitted documentation required for cost reimbursement review in accordance with reporting deadlines, Subrecipient will be required to enter a monthly report containing zero amounts and submit documentation required for the review as part of the next's month reporting;

(D) Subrecipients reporting a monthly report containing zero amounts throughout the program year shall submit all required support documentation to the Department for review by the last regular monthly report (before the final report); and/or

(E) The Department will review and assess supporting documentation submitted by Subrecipient no later than the seventh (7th) day of the following month.

(2) Withhold all payments from the Subrecipient (both reimbursements and advances) until proof of compliance with the rules and regulations are received by the Department, reduce the allocation of funds (with the exception of Community Services Block Grant (CSBG) funds to Eligible Entities [~~eligible entities~~] as described in §5.206 of this chapter (relating to Termination and Reduction of Funding) and as limited for LIHEAP funds as outlined in Texas Government Code, Chapter 2105) or impose sanctions as deemed appropriate by the Department's Executive Director, at any time, if the Department identifies possible instances of fraud, waste, abuse, fiscal mismanagement, or other serious deficiencies in the Subrecipient's performance;

(3) Suspend performance of the contract or reduce funds until proof of compliance with the rules and regulations are received by the Department or a decision is made by the Department to initiate proceedings for contract termination;

(4) Elect not to provide future grant funds to the Subrecipient until appropriate actions are taken to ensure compliance; or

(5) Terminate the contract. Adhering to the requirements governing each specific program administered by the Department, as needed, the Department may determine to proceed with the termination of a contract, in whole or in part, at any time the Department establishes there is good cause for termination. Such cause may include, but is not limited to, fraud, waste, abuse, fiscal mismanagement, or other serious deficiencies in the Subrecipient's performance. For CSBG contract termination procedures, please refer to §5.206 of this chapter.

(c) Contract Close-out. When the Department moves to terminate a contract, the [~~following~~] procedures described in paragraphs (1) - (12) of this subsection will be implemented.

(1) The Department will issue a termination letter to the Subrecipient no less than thirty (30) days prior to terminating the contract. The Department may determine to take one of the following actions: suspend funds immediately; establish a Modified Cost Reimbursement [~~cost reimbursement~~] plan for closeout proceedings; or provide instructions to the Subrecipient to prepare a proposed budget and written plan of action that supports the closeout of the contract. The plan must identify the name and current job titles of staff that will perform the close-out and an estimated dollar amount to be incurred. [~~The Department will respond within ten (10) working days from receipt of the plan.~~]

(2) If the Department determines that a Modified Cost Reimbursement [~~cost reimbursement~~] is an appropriate method of providing funds to accomplish closeout, the Subrecipient will submit backup documentation for all current expenditures associated with the closeout. The required documentation will include, but not be limited to, the chart of accounts, detailed general ledger, revenue and expenditure statements, time sheets, payment vouchers and/or receipts, and bank reconciliations.

(3) No later than thirty (30) days after the contract is terminated, the Subrecipient will take a physical inventory of client files, including case management files, and will submit to the Department an inventory of equipment with a unit acquisition cost of $5,000 or greater for Comprehensive Energy Assistance Program (CEAP), Weatherization Assistance Program (WAP) and Community Services Block Grant (CSBG) or a unit acquisition cost of $500 or greater for ESGP, ESG, and HHSP.

(4) The terminated Subrecipient will have thirty (30) days from the date of the physical inventory to copy all current client files. Client files must be boxed by county of origin. Current and active case management files also must be copied, inventoried, and boxed by county of origin.

(5) Within thirty (30) days following the Subrecipient's due date for copying and boxing client files, Department staff will retrieve copied client files.

(6) The terminated Subrecipient will prepare and submit no later than sixty (60) days from the date the contract is terminated, a final report containing a full accounting of all funds expended under the contract.

(7) A final monthly expenditure report and a final monthly performance report for all remaining expenditures incurred during the close-out period must be received by the Department no later than sixty (60) days from the date the Department determines that the closeout of the program and the period of transition are complete.

(8) The Subrecipient will submit to the Department no later than sixty (60) days after the termination of the contract, an inventory of the non-expendable personal property acquired in whole or in part with funds received under the contract.

(9) The Department may transfer title to equipment having a unit acquisition cost (the net invoice unit price of an item of equipment) of:

(A) $5,000 or greater for CEAP, CSBG, and WAP; or

(B) $500 or greater for ESG, ESGP, and HHSP, to the Department or to any other entity receiving funds under the program in question. The Department will make arrangements to remove equipment covered by this paragraph within ninety (90) days following termination of the contract.

(10) Upon selection of a new service provider, the Department will transfer to the new provider client files and, as appropriate, equipment.

(11) As required by OMB Circular A-133, a current year single audit must be performed for all agencies that have exceeded the federal expenditure threshold under OMB Circular A-133. The Department will allow a proportionate share of program funds to pay for accrued audit costs, when an audit is required, for a single audit that covers the date up to the closeout of the contract. The terminated Subrecipient must have a binding contract with a CPA firm on or before the termination date of the contract. The actual costs of the single audit and accrued audit costs including support documentation must be submitted to the Department no later than sixty (60) days from the date the Department determines the close-out is complete.

(12) Subrecipients shall submit within sixty (60) days after the date of the close-out process all financial, performance, and other applicable reports to the Department. The Department may approve

extensions when requested by the Subrecipient. However, unless the Department authorizes an extension, the Subrecipient must abide by the sixty (60) day contractual requirement of submitting all referenced reports and documentation to the Department.

§5.19. Client Income Guidelines.

(a) The Department has defined eligibility for program assistance under the poverty income guidelines provided annually by the Secretary of the U.S. Department of Health and Human Services (USDHHS). For ESG [~~and HHSP~~], Subrecipients will adhere to 24 CFR §5.609, subject to the revisions of The Housing and Economic Recovery Act of 2008 (HERA), P.L. 110-289.

(b) For all programs except ESG and HHSP [~~USDHHS funded programs~~], Subrecipients will use the [~~following~~] list of included and excluded income to determine eligibility for all programs, as described in paragraphs (1) and (2) of this subsection.

(1) Included Income:

(A) Temporary Assistance for Needy Families (TANF);

(B) Money, wages and salaries before any deductions;

(C) Net receipts from non-farm or farm self-employment (receipts from a person's own business or from an owned or rented farm after deductions for business or farm expenses);

(D) Regular payments from social security, including Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI);

(E) Railroad retirement;

(F) Unemployment compensation;

(G) Strike benefits from union funds;

(H) Worker's compensation;

(I) Training stipends;

(J) Alimony;

(K) Military family allotments;

(L) Private pensions;

(M) Government employee pensions (including military retirement pay);

(N) Regular insurance or annuity payments; and

(O) Dividends, interest, net rental income, net royalties, periodic receipts from estates or trusts; and net gambling or lottery winnings.

(2) Excluded Income:

[~~(A) Social Security Disability Insurance (SSDI) payments;~~]

[~~(B) Supplemental Security Income (SSI) payments;~~]

(A) [~~(C)~~] Capital gains; any assets drawn down as withdrawals from a bank;

(B) [~~(D)~~] The sale of property, a house, or a car;

(C) [~~(E)~~] One-time payments from a welfare agency to a family or person who is in temporary financial difficulty;

(D) [~~(F)~~] Tax refunds, gifts, loans, and lump-sum inheritances;

(E) [~~(G)~~] One-time insurance payments, or compensation for injury;

(F) [~~(H)~~] Non-cash benefits, such as the employer-paid or union-paid portion of health insurance or other employee fringe benefits;

(G) [~~(I)~~] Food or housing received in lieu of wages;

(H) [~~(J)~~] The value of food and fuel produced and consumed on farms;

(I) [~~(K)~~] The imputed value of rent from owner-occupied non-farm or farm housing;

(J) [~~(L)~~] Federal non-cash benefit programs as Medicare, Medicaid, Food Stamps, and school lunches;

(K) [~~(M)~~] Housing assistance and combat zone pay to the military;

(L) [~~(N)~~] Veterans (VA) Disability Payments;

(M) [~~(O)~~] College scholarships, Pell and other grant sources, assistantships, fellowships and work study, VA Education Benefits (GI Bill); and

(N) [~~(P)~~] Child support payments.

§5.20. Determining Income Eligibility.

(a) To determine income eligibility for USDHHS and DOE funded programs, Subrecipients must base annualized eligibility determinations on Household [~~household~~] income from thirty (30) days prior to the date of application for assistance. Each Subrecipient must maintain documentation of income from all sources for all Household [~~household~~] members for the entire thirty (30) day period prior to the date of application and multiply the monthly amount by twelve (12) to annualize income. Income documentation must be collected from all income sources for all Household [~~household~~] members eighteen (18) years and older for the entire thirty (30) day period.

(b) If proof of income is unavailable, the applicant must complete and sign a Department approved declaration of income statement or complete income documentation attestations required by the federal funding source.

§5.21. Subrecipient Contact Information.

(a) Subrecipients will notify the Community Affairs Division (CAD) and provide contact information for [~~of~~] key management staff vacancies and [~~will provide contact information for key management staff~~] new hires within thirty (30) days of such occurrence. Contact information will include, name, title, phone number, and direct email address.

(b) As vacancies exceed the ninety (90) day threshold [~~occur~~] within the organization's board of directors, the CAD will be notified of such vacancies and, if applicable, the sector the board member represented.

(c) Contact information for the board of director's board chair must be provided to CAD and shall include: the board chair's name, mailing address (which must be different from the organization's mailing address), phone number (different from the organization's phone number), fax number (if applicable), and the direct e-mail address for the board chair.

§5.22. Offsite Record Retention.

Client Records. The Department requires Subrecipient [~~subrecipient~~] organizations that administer Community Affairs Programs and serve clients to document client services. Subrecipient organizations must arrange for the security of all program-related computer files through a remote, online, or managed backup service. Confidential client files must be maintained in a manner to protect the privacy of each client and

to maintain the same for future reference. Subrecipient organizations must store physical client files in a secure space in a manner that ensures confidentiality and in accordance with Subrecipient organization policies and procedures. To the extent that it is financially feasible, archived client files should be stored offsite from Subrecipient headquarters, in a secure space in a manner that ensures confidentiality and in accordance with organization policies and procedures.

§5.23. Protected Health Information.

Subrecipients are prohibited and shall not collect or maintain protected health information from any applicant as defined in the Texas Health and Safety Code, Subtitle I, Chapter 181.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 12, 2012.

TRD-201205332
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 475-3916

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SUBCHAPTER B. COMMUNITY SERVICES BLOCK GRANT (CSBG)

10 TAC §§5.201, 5.203 - 5.207, 5.210 - 5.217

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 5, Subchapter B, §§5.201, 5.203 - 5.207, and 5.210 - 5.217, concerning the Community Services Block Grant (CSBG) program. The purpose of the proposed amendments is to add a reference to the prohibition of the use of CSBG funds for political and/or voter activity, to revise the hearing process on termination or reduction of CSBG funds, to remove a specific deadline for CSBG Needs Assessments and Community Action Plans, to add the requirement of maintaining Board training records at the Subrecipient level, and to correct the capitalization of Subrecipient and Eligible Entities throughout the subchapter.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amendments are in effect, enforcing or administering the amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the amendments will be to administer the CSBG funds more efficiently and in accordance with state and federal law. There will not be any economic cost to any individuals required to comply with the amendments.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held from October 26, 2012, to November 26, 2012, to receive input on the amendments. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by email to the following address: cadrulecomments@tdhca.state.tx.us, or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 26, 2012.

STATUTORY AUTHORITY. The amendments are proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules, and Chapter 2306, Subchapter E, which authorizes the Department to administer its Community Affairs programs.

The proposed amendments affect no other code, article, or statute.

§5.201. Background.

(a) In addition to this subchapter [~~the following rules for the Community Services Block Grant (CSBG) program~~], the rules established in Subchapter A of this chapter (relating to General Provisions) also apply to the CSBG program, except those that relate to the suspension, reduction, withholding or termination of funding. The CSBG Act was amended by the "Community Services Block Grant Amendments of 1994" and the Coats Human Services Reauthorization Act of 1998. The Secretary is authorized to establish a community services block grant program and make grants available through the program to states to ameliorate the causes of poverty in communities within the states.

(b) The Texas Legislature designated the Department as the lead agency for the administration of the CSBG program pursuant to Texas Government Code, §2306.092. CSBG funds will be made available to Eligible Entities [~~eligible entities~~] to carry out the purposes of the CSBG program.

§5.203. Distribution of CSBG Funds.

(a) The CSBG Act requires that no less than 90% of the state's allocation be allocated to Eligible Entities [~~eligible entities~~]. The Department currently utilizes a multi-factor fund distribution formula to equitably provide CSBG funds throughout the state's 254 counties to the CSBG Eligible Entities [~~eligible entities~~]. Revisions to the formula shall be considered on a biennial basis including the release of decennial census figures. Changes to the formula shall be presented to the Department's Governing Board for approval.

(b) Five percent of the Department's annual allocation of CSBG funds and any funds not spent as identified in subsection (c) of this section, may be expended for activities as per 42 U.S.C. §9907(b)(A) - (H) and activities that may include:

(1) the provision of training and technical assistance to CSBG Eligible Entities [~~eligible entities~~];

(2) services to low-income migrant seasonal farm worker and Native American populations;

(3) assisting CSBG Eligible Entities [~~eligible entities~~] in responding to natural or man-made disasters;

(4) funding for innovative and demonstration projects that assist CSBG target population groups to overcome at least one of the barriers to attaining self-sufficiency; and

(5) other projects/initiatives, including state conference expenses. The Department may provide monetary awards to Subrecipients [~~subrecipients~~] for outstanding performance. To ensure consistent and comparable results, the process for monetary awards to CSBG Subrecipients [~~subrecipients~~] will be standardized.

(c) Up to 5% of the Department's annual allocation of CSBG funds will be used for administrative purposes consistent with state and federal law.

§5.204. Use of Funds.

(a) CSBG funds distributed to Eligible Entities [~~eligible entities~~] for a fiscal year may be available for obligation during that fiscal year and the succeeding fiscal year. Eligible Entities [~~entities~~] may use the funds for administrative support and/or for direct services such as: education, employment, housing, health care, nutrition, transportation, linkages with other service providers, youth programs, emergency services, i.e., utilities, rent, food, shelter, clothing etc. For additional requirements reference 42 U.S.C. §9908(b)(A)(i-vii) and Office of Management and Budget (OMB) Circulars A-122 and A-87.

(b) Utility and rent deposit refunds from vendors must be reimbursed to the Subrecipient [~~subrecipient~~] and not the client. Funds should be treated as program income.

§5.205. Limitations on Use of Funds.

(a) Construction of Facilities. CSBG funds may not be used for the purchase, construction or improvement of land, or facilities as described in (42 U.S.C. §9918(a)).

(b) Section 678(F)(b)(2) of the Community Services Block Grant (CSBG) Act prohibits the use of program funds for political activity, voter registration activity, or voter registration. The Hatch Act, 5 U.S.C. Chapter 15, amendments to the Hatch Act, and the repeal of §675(e) and §675(C)(6) of the CSBG Act do not affect the prohibition of §678(F)(b)(2).

§5.206. Termination and Reduction of Funding.

(a) If the Department determines, on the basis of a final decision in a review pursuant to the CSBG Act, that an Eligible Entity [~~eligible entity~~] fails to comply with the terms of an agreement or the state plan, to provide services under the CSBG Act or to meet appropriate standards, goals, and other requirements established by the Department (including performance objectives), the Department shall:

(1) inform the entity of the deficiency to be corrected;

(2) require the entity to correct the deficiency;

(3) offer training and technical assistance, if appropriate, to help correct the deficiency, and, as appropriate, prepare and submit to the Secretary a report describing the training and technical assistance offered; or if the Department determines that such training and technical assistance are not appropriate, prepare and submit to the Secretary a report stating the reasons for the determination and the reasons for proceeding with termination proceedings;

(4) At the discretion of the Department (taking into account the seriousness of the deficiency and the time reasonably required to correct the deficiency), the Department shall allow the entity to develop and implement, within sixty (60) days after being informed of the deficiency, a Quality Improvement Plan (QIP) to correct such deficiency within a reasonable period of time, as determined by the Department. No later than thirty (30) days after receiving from an eligible entity a proposed QIP, the Department shall either approve such proposed plan or specify the reasons why the proposed plan cannot be approved;

(5) If the Department does not accept the QIP, the Department, after providing adequate notice of impending termination proceedings and an opportunity for a hearing, may initiate proceedings to terminate or reduce the funding of a Subrecipient [~~subrecipient~~]; and

(6) If the Department has implemented sanctions against a Subrecipient [~~subrecipient~~] and the Subrecipient [~~subrecipient~~] has failed to comply with the QIP or a corrective action plan, the Department may request of the Subrecipient's [~~subrecipient's~~] Board of Directors the voluntary relinquishment of the CSBG program and their designation as a CSBG Eligible Entity [~~eligible entity~~]. If the Subrecipient [~~subrecipient~~] accepts to voluntarily relinquish the CSBG program, the Department will commence contract termination proceedings. If the Subrecipient [~~subrecipient~~] rejects voluntarily relinquishment of the CSBG program or the Department does not accept the Subrecipient's [~~subrecipient's~~] QIP, the Department will initiate procedures for a hearing.

(A) Pursuant to the CSBG Act, the Department will provide notice and an opportunity for a hearing.

(B) The Department will refer a hearing under this section to the State Office of Administrative Hearings (SOAH) [~~select an Administrative Law Judge (ALJ) to oversee the proceedings of the hearing~~]. The Department and Subrecipient will coordinate establishing a date, time and hearing location with SOAH [~~the ALJ~~] and will provide adequate notice to the Subrecipient [~~subrecipient~~]. SOAH will issue a proposal for decision to the TDHCA's Board recommending [~~The ALJ will determine~~] whether there is cause, as defined by the CSBG Act, U.S.C. §9908(c), to terminate or reduce funding to the Subrecipient [~~subrecipient~~]. The TDHCA Board will review the proposal for decision and issue its final order in the matter. [~~The ALJ will issue a proposal for decision on the facts and a recommendation will be presented to the Department's Governing Board for final review.~~]

(C) If the TDHCA Board [~~ALJ~~] determines that there is cause to terminate or reduce funding, pursuant to 42 U.S.C. §9915, the Department will notify the Subrecipient [~~subrecipient~~] that it has the right under 42 U.S.C. §9915 to seek review of the decision by the USDHHS. If the USDHHS does not overturn the decision, or if the Subrecipient [~~subrecipient~~] does not seek USDHHS review, the Department will initiate proceedings to terminate and close-out the contract.

(b) Any right or remedy given to the Department by this chapter does not preclude the existence of any other right or remedy, nor shall any action or lack of action by the Department in the exercise of any right or remedy be deemed a waiver of any other right or remedy.

§5.207. Subrecipient Performance.

(a) Budgets. CSBG Eligible Entities [~~eligible entities~~] and any other funded organizations shall submit a budget to facilitate the contract execution process. A certification of board approval of CSBG budget form issued by the Department must also be submitted with planned budgets.

(b) Unexpended Funds. The Department reserves the right to deobligate funds.

(1) The U.S. Department of Health and Human Services Administration for Children and Families issues terms and conditions for receipt of funds under the CSBG. Subrecipients of CSBG funds will comply with the requirements of the terms and conditions of the CSBG award. [~~Services must be provided on or before September 30th of the subsequent year and funds must be fully expended.~~]

(2) The Coats Human Services Reauthorization Act of 1998, allows states to recapture unexpended CSBG funds in excess of 20% of the CSBG funds obligated to an Eligible Entity [~~eligible entity~~]. This may be superseded by Congressional action in the appropriation process or by the terms and conditions issued by U.S. Department of Health and Human Services in the CSBG award letter.

(c) Services to Poverty Population. Subrecipients [~~The subrecipient organizations~~] administering services to clients in one or more

CSBG service area counties shall ensure that such services are rendered reasonably and in an equitable manner to ensure fairness among all potential applicants eligible for services. Services rendered must reflect the poverty population ratios in the service area and services should be distributed based on the proportionate representation of the poverty population within a county. A variance of greater than plus or minus 20% may constitute a finding. Subrecipients with a service area of a single county shall demonstrate marketing and outreach efforts to render direct services to a reasonable percentage of the county's eligible population based on the most recent decennial census. Services should also be distributed based on the proportionate representation of the poverty population within a county.

§5.210. CSBG Needs Assessment and Community Action Plan.

(a) In accordance with the CSBG Act and §676 of the Act, the Department is required to secure a Community Action Plan on an annual basis from each CSBG Eligible Entity [~~eligible entity due on October 31st~~].

(b) Every five (5) years, the CSBG Community Action Plan will include a community needs assessment from every CSBG Eligible Entity.

(c) The Community Action Plan shall at a minimum include a description of the delivery of services for the case management system in accordance with the National Performance Indicators and shall include a performance statement that describes the services, programs and activities to be administered by the organization.

(d) Hearing. A board certification that a public hearing was conducted on the proposed use of funds for the Community Action Plan must be submitted to the Department with the plan.

(e) Intake Form. To fulfill the requirements of 42 U.S.C. §9917, CSBG Subrecipients [~~subrecipients~~] must complete an intake form which includes the demographic and household characteristic data required for the monthly performance and expenditure report, referenced in Subchapter A of this chapter, for all Households [~~households~~] receiving a community action service. A new CSBG intake form or a centralized intake form must be completed on an annual basis to coincide with the CSBG program year of January 1st through December 31st.

(f) Case Management.

(1) In keeping with the regulations issued under Title II, §676(b) State Application and Plan, the Department requires CSBG Subrecipients [~~subrecipients~~] to incorporate integrated case management systems in the administration of their CSBG program (Title II, §676(b)). Incorporating case management in the service delivery system and providing assistance that has a long-term impact on the client, such as enabling the client to move from poverty to self-sufficiency, to maintain stable families, and to revitalize the community, supports the requirements of Title II, §676(b). An integrated case management system improves the overall provision of assistance and improves each Subrecipient's [~~subrecipient's~~] ability to transition persons from poverty to self-sufficiency.

(2) Subrecipients must have in operation a case management program that has the [~~following~~] components described in subparagraphs (A) - (H) of this paragraph:

(A) Intake Form;

(B) Pre-assessment to determine service needs, to determine the need for case management, and to determine which individuals/families to consider enrolling in case management program;

(C) Integrated assessment of individual/family service needs of those accepted into case management program;

(D) Development of case management service plan to meet goals and become self-sufficient;

(E) Provision of services and coordination of services to meet needs and achieve self-sufficiency;

(F) Monitoring and follow-up of participant's progress;

(G) Case closure, once individual has become self-sufficient; and

(H) Evaluation process to determine effectiveness of case management system.

(3) As required by 42 U.S.C. §678G(b)(1-2), CSBG Subrecipients [~~subrecipients~~] shall inform custodial parents in single-parent families that participate in programs, activities, or services about the services available through the Texas Attorney General's Office with respect to the collection of child support payments and/or refer eligible parents to the Texas Attorney General's Office of Child Support Services Division.

(g) Non-CSBG Eligible Entities [~~eligible entities~~] receiving state discretionary funds under §5.203(b) of this subchapter (relating to Distribution of CSBG Funds) are not required to submit a Community Action Plan. All CSBG Subrecipients [~~subrecipients~~] must develop a performance statement which identifies the services, programs, and activities to be administered by the organization.

(h) Subrecipient Requirements for Appeals Process for CSBG Applicants/Clients. Subrecipients shall establish a CSBG denial of service complaint [~~grievance~~] procedure to address written complaints from program applicants/clients. At a minimum, the [~~following~~] procedures described in paragraphs (1) - (8) of this subsection shall be included:

(1) Subrecipients shall provide a written denial of assistance notice to applicant/client within ten (10) business days of the adverse determination. This notification shall include written notice of the right to a hearing [~~instructions of the appeals process~~] and specific reasons for the denial by component. The applicant wishing to appeal a decision must provide written notice to Subrecipient [~~subrecipient~~] within twenty (20) [~~ten (10) business~~] days of receipt of the denial notice;

(2) Subrecipient [~~The subrecipient~~] who receives an appeal or client complaint shall establish an appeal [~~a hearing~~] committee composed of at least three persons. Subrecipient shall maintain documentation of appeals/complaints in their client files;

(3) Subrecipient [~~The subrecipient~~] shall hold the hearing within twenty (20) [~~business~~] days after the Subrecipient [~~subrecipient~~] received the appeal/complaint request from the applicant/client;

(4) Subrecipient [~~The subrecipient~~] shall record the hearing;

(5) The hearing shall allow time for a statement by Subrecipient [~~subrecipient~~] staff with knowledge of the case;

(6) The hearing shall allow the applicant/client at least equal time, if requested, to present relevant information contesting the decision;

(7) Subrecipient shall notify applicant/client of the decision in writing. The Subrecipient [~~subrecipient~~] shall mail the notification by close of business on the business day [~~on the fifth business day~~] following the decision (one (1) day turnaround) [~~(5-day turnaround)~~];

(8) If the denial is solely based on income eligibility, the provisions in paragraphs (2) - (7) of this subsection, do not apply and the applicant may request a recertification of income eligibility based

on initial documentation provided at the time of the original application. The recertification will be an analysis of the initial calculation based on the documentation received with the initial application for services and will be performed by an individual other than the person who performed the initial determination. If the recertification upholds the denial based on income eligibility documents provided at the initial application, the applicant is notified in writing and no further appeal is afforded to the applicant.

(i) [(8)] If the applicant [applicant/client] is not satisfied, the applicant [they] may further appeal the decision in writing to the Department within ten (10) [business] days of notification of an adverse decision.[;]

[(9) The Department may review the recording of the hearing, the committee's decision, and any other relevant information necessary;]

[(10) Pursuant to §1.7 of this title (relating to Staff Appeals Process), Department staff shall review the case and forward the recommendation to the Division Director for final concurrence; and]

[(11) The Department will notify all parties in writing of its decision within thirty (30) days of receipt of the appeal.]

[(12) If the denial is solely based on income eligibility, the previous provisions in paragraphs (2) - (11) of this subsection, do not apply and the applicant may request a recertification of income eligibility based on initial documentation provided at the time of the original application. The recertification will be an analysis of the initial calculation based on the documentation received with the initial application for services and will be performed by an individual other than the person who performed the initial determination. If the recertification upholds the denial based on income eligibility documents provided at the initial application, the applicant is notified in writing and no further appeal is afforded to the applicant.]

(j) Affected persons who allege that the Subrecipient has denied all or part of a service or benefit in a manner that is unjust, violates discrimination laws, or without reasonable basis in law or fact, may request a contested hearing under Texas Government Code, Chapter 2001.

(k) The hearing shall be conducted by the State Office of Administrative Hearings on behalf of the Department in the locality served by the Subrecipient.

(l) If client appeals to the Department, the funds should remain encumbered until the Department completes its decision.

§5.211. Subrecipient Reporting Requirements.

(a) Monthly Performance and Expenditure Report. CSBG Subrecipients [subrecipients] must submit a monthly performance and expenditure report. Subrecipients shall submit the Monthly Expenditure Report and Monthly Performance Report no later than the fifteenth (15th) day of the month after each month of the contract period. Even if a fund reimbursement is not being requested, an Expenditure Report must be submitted electronically on or before the fifteenth (15th) day of each month of the grant period. A final Expenditure Report must be submitted within sixty (60) days after the CSBG contract ends. The "Community Affairs Contract User Guide System" may be accessed through the TDHCA website, www.tdhca.state.tx.us.

(b) Reporting. Federal requirements mandate all states to participate in the preparation of an annual performance measurement report (also referred to as the CSBG National Survey). To comply with the requirements of §678E of the CSBG Act, all CSBG Eligible Entities [eligible entities] and other organizations receiving CSBG funds are required to participate.

§5.212. CSBG Board of Directors Membership and Meeting Requirements for CSBG Eligible Entity's Tripartite Boards.

(a) General Board Requirements:

(1) The Coats Human Services Reauthorization Act (Public Law 105-285) addresses the CSBG program and requires that Eligible Entities [eligible entities] administer the CSBG program through a tripartite board. The Act requires that governing boards or a governing body be involved in the development, planning, implementation, and evaluation of the programs serving the low-income sector. Also, the Texas Legislature, through §551.001(3) of the Texas Government Code, addresses specific requirements regarding meetings, meeting notices, and open meeting records through the Open Meetings Act (Texas Government Code, §§551.001, et seq.) and the Public Information Act (Texas Government Code, §§552, et seq.). State legislation has also defined as a governmental body, nonprofit corporation boards that are eligible to receive funds under the federal CSBG program and that are authorized by the state to serve a geographic area of the state.

(2) Federal requirements for establishing a tripartite board require board oversight responsibilities for public entities, which differ from requirements for private organizations. Where differences occur between private and public organizations, requirements for each entity have been noted in related sections of the rule.

(b) Each CSBG Eligible Entity [eligible entity] shall comply with the provisions of this rule and if necessary, the Eligible Entity's [eligible entity's] by-laws shall be amended to reflect compliance with these requirements.

§5.213. Board Structure.

(a) Private nonprofit entities, shall administer the CSBG program through a tripartite board that fully participates in the development, planning, implementation, and evaluation of the program to serve low-income communities. Some of the members of the board shall be selected by the private nonprofit entity and others through a democratic process; the board shall be composed so as to assure that the requirements of §676B(a)(2) of the CSBG Act are followed and are composed as [follows]:

(1) One-third of the members of the board shall be elected public officials, holding office on the date of the selection, or their representatives. In the event that there are not enough elected public officials reasonably available and willing to serve on the board, the entity may select appointive public officials to serve on the board. The public officials selected to serve on the board may each choose one permanent representative or designate an alternate to serve on the board. Appointive public officials or their representatives or alternates may be counted in meeting the 1/3 requirement. Refer to subsection (d)(1)(B) of this section entitled "Permanent Representatives and Alternates" for related information;

(2) not fewer than 1/3 of the members are persons chosen in accordance with democratic selection procedures adequate to assure that these members are representative of low-income individuals and families in the neighborhood served; and each representative of low-income individuals and families selected to represent a specific neighborhood within a community under subsection (b)(1)(B) of this section, resides in the neighborhood represented by the member;

(3) the remainder are members of business, industry, labor, religious, law enforcement, education, or other major groups and interests in the community served.

(b) For public organizations to be considered to be an eligible entity for purposes of the CSBG Act, §676B(b), the entity shall administer the CSBG grant through tripartite boards as [follows]:

(1) A tripartite board, which shall have members selected by the organization and shall be composed so as to assure that not fewer than 1/3 of the members are persons chosen in accordance with democratic selection procedures adequate to assure that these members:

(A) are representative of low-income individuals and families in the neighborhood served;

(B) reside in the neighborhood served; and

(C) are able to participate actively in the development, planning, implementation, and evaluation of programs funded under this chapter; or

(D) If conditions in subparagraphs (A) - (C) of this paragraph are not utilized, then another mechanism specified by the state which meets the tripartite requirements may be used. Public organizations that choose to utilize another mechanism must submit to the Department, for review and approval, a description of the mechanism to be utilized to select low-income representatives. The mechanism must assure decision-making and participation by low-income individuals in the development, planning, implementation, and evaluation of programs funded under this chapter.

(2) One-third of the members of the board shall be elected public officials, holding office on the date of the selection, or their representatives. In the event that there are not enough elected public officials reasonably available and willing to serve on the board, the entity may select appointive public officials to serve on the board. The public officials selected to serve on the board may each choose one permanent representative or designate an alternate to serve on the board. Refer to subsection (d)(1)(B) of this section, entitled "Permanent Representatives and Alternates" for related information.

(3) The remainder of the members are officials or members of business, industry, labor, religious, law enforcement, education, or other major groups and interests in the community served.

(c) Eligible Entities [~~entities~~] administering the Head Start Program must comply with, the Head Start Act (42 U.S.C. §9837) that requires the governing body membership to comply with the requirements of §642(c)(1) of the Head Start Act. Exceptions shall be made to the requirements of clauses (i) - (iv) of §642(c)(1) of the Head Start Act for members of a governing body when those members oversee a public entity and are selected to their positions with the public entity by public election or political appointment.

(d) Selection. Pursuant to §676B of the CSBG Act, Private nonprofit entities and public organizations have the responsibility for selection and composition of the board.

(1) Public Officials:

(A) Elected public officials or appointed public officials, selected to serve on the board, shall have either general governmental responsibilities or responsibilities which require them to deal with poverty-related issues; and

(B) Permanent Representatives and Alternates. The public officials selected to serve on the board may each choose one permanent representative or designate an alternate to serve on the board.

(i) Permanent Representatives. The public officials selected by a private nonprofit entity or public organization to serve on the board may each choose one permanent representative to serve on the board in a full-time capacity. The public officials of the public organization may choose a representative to serve on the board or other governmental body. The representative need not be a public official but shall have full authority to act for the public official at meetings of the board. Permanent representatives may hold an officer position on the board. If a permanent representative is not chosen, then an alternate may be designated by the public official selected to serve on the board. Alternates may not hold an officer position on the board.

(ii) Alternate Representatives. If the private nonprofit entity or public organization board chooses to allow alternates, the alternates for low-income representatives shall be elected at the same time and in the same manner as the board representative is elected to serve on the board. Alternates for representatives of private sector organizations may be designated to serve on the board and should be selected at the same time the board representative is selected. In the event that the board member or alternate ceases to be a member of the organization represented, he/she shall no longer be eligible to serve on the board. Alternates may not hold an officer position on the board.

(2) Low-Income Representatives:

(A) An essential objective of community action is participation by low-income individuals in the programs which affect their lives; therefore, the CSBG Act and its amendments require representation of low-income individuals on boards or state-specified governing bodies. The CSBG statute requires that not fewer than one-third of the members shall be representatives of low-income individuals and families and that they shall be chosen in accordance with democratic selection procedures adequate to assure that these members are representative of low-income individuals and families in the neighborhoods served; and that each representative of low-income individuals and families selected to represent a specific neighborhood within a community resides in the neighborhood represented by the member; or

(B) Board members representing low-income individuals and families must be selected in accordance with a democratic procedure. This procedure, as detailed in subparagraph (D) of this paragraph, may be either directly through election, public forum, or, if not possible, through a similar democratic process such as election to a position of responsibility in another significant service or community organization such as a school PTA, a faith-based organization leadership group; or an advisory board/governing council to another low-income service provider;

(C) Every effort should be made by the nonprofit entity or public organization to assure that low-income representatives are truly representative of current residents of the geographic area to be served, including racial and ethnic composition, as determined by periodic selection or reselection by the community. "Current" should be defined by the recent or annual demographic changes as documented in the needs/community assessment. This does not preclude extended service of low-income community representatives on boards, but it does suggest that continued board participation of longer term members be revalidated and kept current through some form of democratic process; and

(D) The procedure used to select the low-income representative must be documented to demonstrate that a democratic selection process was used. Among the selection processes that may be utilized, either alone or in combination, are:

(i) Selection and elections, either within neighborhoods or within the community as a whole; at a meeting or conference, to which all neighborhood residents, and especially those who are poor, are openly invited;

(ii) Selection of representatives to a community-wide board by members of neighborhood or sub-area boards who are themselves selected by neighborhood or area residents;

(iii) Selection, on a small area basis (such as a city block); or

(iv) Selection of representatives by existing organizations whose membership is predominately composed of poor persons.

(3) Representatives of Private Groups and Interests:

(A) The private nonprofit entity or public organization shall select the remainder of persons to represent the private sector on the board or it may select private sector organizations from which representatives of the private sector organization would be chosen to serve on the board; and

(B) The individuals and/or organizations representing the private sector shall be selected in such a manner as to assure that the board will benefit from broad community involvement. The board composition for the private sector shall draw from officials or members of business, industry, labor, religious, law enforcement, education, school districts, representatives of education districts and other major groups and interests in the community served.

§5.214. Board Administrative Requirements.

(a) Powers of the Board for Private Nonprofit Entities. The board is responsible for abiding by the terms of contracts and shall determine the policies of the agency to assure accountability for public funding. The board shall function as the organization's governing body with the same legal powers and responsibilities as the board of directors of any nonprofit corporation.

(b) Powers of the Board for Public Organizations. The powers, duties, and responsibilities of the board shall be determined by the governing officials of the public organization. The governing officials may establish:

(1) an advisory board, in which case the authority given to the advisory board depends on the powers delegated to it by the governing officials of the political subdivision; or

(2) a governing board, empowering the board of directors with substantive decision-making authority and delegating the powers, duties, and responsibilities to carry out its CSBG-supported contract and functions.

(c) Compensation. Board members are not entitled to compensation for their service on the board. Reimbursement of reasonable and necessary expenses incurred by a board member in carrying out his/her duties is allowed.

(d) Conflict of Interest. No board member may participate in the selection, award, or administration of a subcontract supported by CSBG funds if:

(1) the board member;

(2) any member of his/her immediate family (as defined in the CSBG contract);

(3) the board member's partner; or

(4) any organization which employs or is about to employ any of the individuals described in paragraphs (1) - (3) of this subsection [~~above~~], has a financial interest in the firm or person selected to perform a subcontract. No employee of the local CSBG Subrecipient [~~subrecipient~~] or of the Department [~~Texas Department of Housing and Community Affairs~~] may serve on the board.

§5.215. Board Size.

(a) Board Service Limitations for Private Nonprofit Entities and Public Organizations Subrecipients boards may establish bylaws which allow for term limits and/or procedures for the removal of board members.

(b) Vacancies/Removal of Board Members.

(1) Vacancies. In no event shall the board allow 25% or more of either the public, private, or poverty sector board positions to remain vacant for more than ninety (90) days. CSBG Subrecipients [~~subrecipients~~] shall report the number of board vacancies by sector in their monthly performance reports. Compliance with the CSBG Act requirements for board membership is a condition for Eligible Entities [~~eligible entities~~] to receive CSBG funding. There is no provision in the Act for a waiver or exception to these requirements.

(2) Removal of Board Members/Private Nonprofit Entities. Public officials or their representatives, may be removed from the board either by the board or by the entity that appointed them to serve on the board. Other members of the board may be removed by the board or pursuant to any procedure provided in the private nonprofit's by-laws.

(3) Removal of Board Members/Public Organizations. Board members may be removed from the board by the public organization or by the board if the board is so empowered by the public organization. The board may petition the public organization to remove a board member or the public organization may delegate the power of removal to the board.

§5.216. Board Responsibility.

(a) Tripartite boards have a fiduciary responsibility for the overall operation of the private nonprofit entity. Members are expected to carry out their duties as any reasonably prudent person would do.

(b) At a minimum, board members are expected to:

(1) Maintain regular attendance of board and committee meetings;

(2) Develop thorough familiarity with core agency information, such as the agency's bylaws, as appropriate, articles of incorporation, sources of funding, agency goals and programs, federal and state CSBG statutes;

(3) Exercise careful review of materials provided to the board;

(4) Make decisions based on sufficient information;

(5) Ensure that proper fiscal systems and controls, as well as a legal compliance system, are in place;

(6) Maintain knowledge of all major actions taken by the agency; and

(7) Receive regular reports that includes:

(A) Review and approval of all funding requests (including budgets);

(B) Review of reports on the organization's financial situation;

(C) Regular reports on the progress of goals specified in the performance statement or program proposal;

(D) Regular reports addressing the rate of expenditures as compared to those projected in the budget;

(E) Updated modifications to policies and procedures concerning employee's and fiscal operations; and

(F) Updated information on community conditions that affect the programs and services of the organization.

(c) Individuals that agree to participate on a tripartite governing board, accept the responsibility to assure that the agency they represent continues to:

(1) assess and respond to the causes and conditions of poverty in their community;

(2) achieve anticipated family and community outcomes; and

(3) remains administratively and fiscally sound. Excessive absenteeism of board members compromises the mission and intent of the program.

(d) Residence Requirement:

(1) All board members shall reside within the Subrecipient's [~~subrecipient's~~] CSBG service area designated by the CSBG contract. Board members should be selected so as to provide representation for all geographic areas within the designated service area; however, greater representation may be given on the board to areas with greater poverty population. Low-income representatives must reside in the area that they represent; and

(2) Subrecipients may request a waiver of the residency requirement to the Director of the Community Affairs Division for review for consideration and/or approval.

(e) Improperly Constituted Board. If the Department determines that a board of an Eligible Entity [~~eligible entity~~] is improperly constituted, the Department shall prescribe the necessary remedial action, a timeline for implementation and possible sanctions which may include:

(1) cost reimbursement method of payment;

(2) withholding of funds;

(3) contract suspension; or [~~and~~]

(4) termination of funding.

§5.217. Board Meeting Requirements.

(a) The Board must follow the Texas Open Meetings Act, meet at least once per calendar quarter and at a minimum five (5) times per year and, must give each member a notice of meeting five (5) days in advance of the meeting.

(b) Open Meetings Training.

(1) Texas Government Code, §551.005 requires [~~Effective January 1, 2006, the 79th Texas Legislature established a state law §551.005 of the Texas Government Code requiring~~] elected and appointed officials to receive training in Texas Open Government laws. [~~The state law is in accordance to Texas Government Code, Title 5, §551.005 and §552.012.~~] This mandate applies to the board of directors for CSBG Eligible Entities, and public sector local officials, [~~eligible entities~~] and requires that training is received within ninety (90) days of becoming a board member. As part of this requirement, the Office of the Attorney General has established and made available formal training to ensure government officials have a good command of open records and open meeting laws. To fulfill this requirement, the Office of the Attorney General offers free training videos which may be requested by accessing their website at www.oag.state.tx.us/open/og_training.shtml [~~www.oag.state.tx.us/opinopen/og_training.shtml~~] or by calling 1-800-252-8011.

(2) Legislation requires open meetings training for public sector local officials; however, the Department recommends this training for all board members. Boards shall ensure that all members serving on the Board of Directors shall receive this training according to the deadlines described in this subsection.

(3) A copy of the attendance roster for all Board trainings shall be maintained at the Subrecipient level. [~~The organization shall maintain a copy of the board training certificate issued to participants upon completion of the training.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 12, 2012.

TRD-201205337
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 475-3916

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SUBCHAPTER D. COMPREHENSIVE ENERGY ASSISTANCE PROGRAM

10 TAC §§5.401 - 5.408, 5.421 - 5.423, 5.430 - 5.432

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 5, Subchapter D, §§5.401 - 5.408, 5.421 - 5.423, and 5.430 - 5.432, concerning the Comprehensive Energy Assistance Program (CEAP). The purpose of the proposed amendments is to remove Direct Service Support as an allowable expenditure, remove any related reference to the sections proposed for repeal, as recommended by the U.S. Department of Health and Human Services (USDHHS), emphasize the priority given to Households with a child age 5 or younger, disabled or elderly individual, revise the maximum allowable benefits to be consistent with the FFY 2013 Low-Income Home Energy Assistance Program (LIHEAP) Plan, and revise reporting requirements to reallocate CEAP funds more efficiently.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amendments are in effect, enforcing or administering the amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the amendments will be the more efficient administration of the CEAP funds and greater consistency with the 2013 LIHEAP State Plan. There will not be any economic cost to any individuals required to comply with the amendments.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held from October 26, 2012 to November 26, 2012, to receive input on the amendments. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941; by email to the following address: cadrulecomments@tdhca.state.tx.us; or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 26, 2012.

STATUTORY AUTHORITY. The amendments are proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

The proposed amendments affect no other code, article, or statute.

§5.401. Background.

The Comprehensive Energy Assistance Program (CEAP) is funded through the Low Income Home Energy Assistance Act of 1981 (Title XXVI of the Omnibus Budget Reconciliation Act of 1981, Public Law 97-35, as amended). LIHEAP has been in existence since 1982. LIHEAP is a federally funded block grant program that is implemented to serve low income Households [~~households~~] who seek assistance for their home energy bills.

§5.402. Purpose and Goals.

The purpose of CEAP is to assist low-income Households [~~households~~], particularly those with the lowest incomes, that pay a high proportion of Household [~~household~~] income for home energy, primarily in meeting their immediate home energy needs. The program requires [~~encourages~~] priority be given to those with the highest home energy needs, meaning low income Households [~~households~~] with high residential energy use, a high energy burden and/or the presence of a "vulnerable" individual in the Household [~~household~~], such as a child age 5 and younger, disabled person, or an elderly individual. CEAP services include: energy education, needs assessment, budget counseling (as it pertains to energy needs), utility payment assistance, [~~crisis-related~~] repair of existing heating and cooling units, and crisis-related purchase of portable heating and cooling units.

§5.403. Distribution of CEAP Funds.

(a) The Department distributes funds to Subrecipients [~~subrecipients~~] by an allocation formula.

(b) The formula allocates funds based on the number of low-income Households [~~households~~] in a service area and takes into account the special needs of individual service areas. The need for energy assistance in an area is addressed through a weather factor (based on heating and cooling degree days). The extra expense in delivering services in sparsely populated areas is addressed by an inverse population density factor. The lack of additional services available in very poor counties is addressed by a county median income factor. Finally, the elderly are given priority by giving greater weight to this population. The five factors used in the formula are calculated as [~~follows~~]:

(1) County Non-elderly Poverty Household Factor (weight of 40%) is defined by the Department as the number of Non-elderly Poverty Households in the County divided by the number of Non-elderly Poverty Households in the state [~~State~~];

(2) County Elderly Poverty Household Factor (weight of 40%) is defined by the Department as the number of Elderly Poverty Households in the County divided by the number of Elderly Poverty Households in the state [~~State~~]; and

(3) County Inverse Poverty Household Density Factor (weight of 5%) is defined by the Department as:

(A) The number of Square Miles of the County divided by the number of Poverty Households of the County (equals the Inverse Poverty Household Density of the County); and

(B) Inverse Poverty Household Density of the County divided by the Sum of Inverse Household Densities.

(4) County Median Income Variance Factor (weight of 5%) is defined by the Department as:

(A) State Median Income minus the County Median Income (equals County Variance); and

(B) County Variance divided by sum of the State County Variances.

(5) County Weather Factor (weight of 10%) is defined by the Department as:

(A) County Heating Degree Days plus the County Cooling Degree Days, multiplied by the Poverty Households, divided by the sum of County Heating & Cooling Degree Days of Counties (equals County Weather); and

(B) County Weather divided by the total sum of the State County Weather.

(C) All demographic factors are based on the decennial U.S. Census.

(D) Total sum of paragraphs [~~subsection (b)~~](1) - (5) of this subsection [~~section~~] multiplied by total funds allocation equals the County's allocation of funds. The sum of the county allocations within each Subrecipient [~~subrecipient~~] service area equals the Subrecipient's [~~subrecipient's~~] total allocation of funds.

§5.404. Subrecipient Eligibility.

(a) The Department shall ensure that: to the extent it is necessary to designate local administrative agencies in order to carry out the purposes of Title 42 U.S.C. §§8621, et seq; give special consideration to any local public or private nonprofit agency which was receiving Federal funds.

(1) The Department shall, before giving such special consideration, determine that the agency involved meets program and fiscal requirements established by the Department; and

(2) if there is no such agency because of any change in the assistance furnished to programs for economically disadvantaged persons, then the Department shall give special consideration in the designation of local administrative agencies to any successor agency which is operated in substantially the same manner as the predecessor agency which did receive funds for the fiscal year preceding the fiscal year for which the determination is made.

(b) The Department administers the program through the existing Subrecipients [~~subrecipients~~] that have demonstrated that they are operating the program in accordance with the Economic Opportunity Act of 1964, the Low-Income Home Energy Assistance Act of 1981, as amended (42 U.S.C. §§8621, et seq.), and the Department rules. If Subrecipients [~~subrecipients~~] are successfully administering the program, the Department may offer to renew the contract.

(c) When the Department determines that an organization is not administering the program satisfactorily, corrective actions are taken to remedy the problem. Thereafter, if Subrecipient [~~subrecipient~~] fails to administer the program correctly, the Department reassigns the service area or a portion to another existing Subrecipient [~~subrecipient~~] or conducts solicitation or selection of a new Subrecipient [~~subrecipient~~] in accordance with the Low-Income Home Energy Assistance Act of 1981. The affected Subrecipient may request a hearing in accordance with the Texas Government Code, §2105.204.

§5.405. Subrecipient Requirements for Appeals Process for Applicants.

(a) Subrecipient shall establish a denial of service complaint procedure to address written complaints from program applicants/clients. At a minimum, the procedures described in paragraphs (1) - (8) of this subsection shall be included:

(1) [~~(a)~~] Subrecipients shall provide a written denial of assistance notice to applicant within ten (10) days of the adverse determination. This notification shall include written notice of the right of a hearing [~~instructions of the appeals process~~] and specific reasons for the denial by component. The applicant wishing to appeal a decision must

provide written notice to Subrecipient [~~subrecipient~~] within twenty (20) [~~ten (10)~~] days of receipt of the denial notice.

(2) [~~(b)~~] Subrecipient [~~The subrecipient~~] who receives an appeal shall establish an appeals committee composed of at least three persons. Subrecipient shall maintain documentation of appeals in their client files.

(3) [~~(c)~~] Subrecipients [~~The subrecipient~~] shall hold the appeal hearing within ten (10) business days after the Subrecipient [~~subrecipient~~] received the appeal request from the applicant.

(4) [~~(d)~~] Subrecipient [~~The subrecipient~~] shall record the hearing.

(5) [~~(e)~~] The hearing shall allow time for a statement by Subrecipient [~~subrecipient~~] staff with knowledge of the case.

(6) [~~(f)~~] The hearing shall allow the applicant at least equal time, if requested, to present relevant information contesting the decision.

(7) [~~(g)~~] Subrecipient shall notify applicant of the decision in writing. The Subrecipient [~~subrecipient~~] shall mail the notification by close of business on the business day following the decision (1 day turn-around).

(8) If the denial is solely based on income eligibility, the provisions described in paragraphs (2) - (7) of this subsection do not apply and the applicant may request a recertification of income eligibility based on initial documentation provided at the time of the original application. The recertification will be an analysis of the initial calculation based on the documentation received with the initial application for services and will be performed by an individual other than the person who performed the initial determination. If the recertification upholds the denial based on income eligibility documents provided at the initial application, the applicant is notified in writing and no further appeal is afforded to the applicant.

(b) [~~(h)~~] If the applicant is not satisfied, the applicant [~~they~~] may further appeal the decision in writing to the Department within ten (10) days of notification of an adverse decision.

(c) Affected persons who allege that the Subrecipient has denied all or part of a service or benefit in a manner that is unjust, violates discrimination laws, or without reasonable basis in law or fact, may request a contested hearing under Texas Government Code, Chapter 2001.

(d) The hearing shall be conducted by the State Office of Administrative Hearings on behalf of the Department in the locality served by the Subrecipient.

(e) [~~(i)~~] If client appeals to the Department, the funds should remain encumbered until the Department completes its decision.

[~~(j) The Department may review the recording of the hearing the committee's decision and any other relevant information necessary.~~]

[~~(k) The Department appeals committee shall decide the case and forward their recommendation to the Community Affairs Division Director for final concurrence.~~]

[~~(l) The Department will notify all parties in writing of its decision within thirty (30) days of receipt of the appeal.~~]

§5.406. Subrecipient Reporting Requirements.

(a) Subrecipient [~~The subrecipient~~] shall electronically submit to the Department a monthly expenditure report [~~Monthly Expenditure Report~~] of all expenditure of funds, request for advance or reimbursement, and a monthly performance report [~~Monthly Performance Report~~] no later than fifteen (15) days after the end of each month.

(b) Subrecipient [~~The subrecipient~~] shall provide Direct Services to clients [~~under the Household Crisis, Elderly Disabled or the Co-Payment program components~~] within sixty (60) days of receipt of contract funds.

(c) Subrecipient [~~The subrecipient~~] shall electronically submit to the Department no later than forty-five (45) [~~sixty (60)~~] days after the end of the Subrecipient [~~subrecipient~~] contract term a final expenditure or reimbursement and programmatic report utilizing the expenditure report [~~Expenditure Report~~] and the performance report [~~Performance Report~~].

(d) Subrecipient [~~The subrecipient~~] shall submit to the Department no later than forty-five (45) [~~sixty (60)~~] days after the end of the contract term an inventory of all vehicles, tools, and equipment with a unit acquisition cost of $5,000 or more and a useful life of more than one year, if purchased in whole or in part with CEAP funds.

(e) Subrecipient [~~The subrecipient~~] shall submit other reports, data, and information on the performance of the CEAP program activities as required by the Department.

§5.407. Subrecipient Requirements for Establishing Priority for Eligible Households and Client Eligibility Criteria.

(a) Subrecipients [~~The subrecipients~~] shall set the client income eligibility level at or below 125% of the federal poverty level in effect at the time the client makes an application for services.

(b) Subrecipient shall determine client income. Income inclusions and exclusions to be used to determine total Household [~~household~~] income are those noted in §5.19 of this chapter (relating to Client Income Guidelines).

(c) Subrecipients shall base annualized eligibility determinations on Household [~~household~~] income from the thirty (30) day period prior to the date of application for assistance. Each Subrecipient [~~subrecipient~~] shall document and retain proof of income from all sources for all Household [~~household~~] members eighteen (18) years and older for the entire thirty (30) day period prior to the date of application and multiply by twelve (12) to annualize income.

(d) In the case of migrant, or seasonal workers, or similarly situated workers, a longer period than thirty (30) days may be used for annualizing income.

(e) If proof of income is unobtainable [~~unavailable~~], the applicant must complete and sign a Declaration of Income Statement (DIS). In order to use the DIS form, each Subrecipient [~~subrecipient~~] shall develop and implement a written policy and procedure on the use of the DIS form, including policies requiring a client statement of efforts to obtain documentation of income with a notarized client signature. In developing the policy and procedure, Subrecipients [~~subrecipients~~] shall limit [~~give consideration to limiting~~] the use of the DIS form to cases where there are serious extenuating circumstances that justify the use of the form. Such circumstances might include crisis situations such as applicants that are affected by natural disaster which prevents the applicant from obtaining income documentation, applicants that flee a home due to physical abuse, applicants who are unable to locate income documentation of a recently deceased spouse, or whose work is migratory, part-time, temporary, self-employed or seasonal in nature. To ensure limited use, the Department will review the written policy and its use, as well as client-provided descriptions of the circumstances requiring use of the form, during on-site monitoring visits.

(f) Social security numbers are not required for applicants for CEAP.

(g) Subrecipients [~~The subrecipients~~] shall establish priority criteria to serve persons in Households [~~households~~] who are partic-

ularly vulnerable such as the elderly, persons with disabilities, families with young children, high residential energy users, and Households [~~households~~] with high energy burden. High residential energy users and Households [~~households~~] with high energy burden are defined as [~~follows~~]:

(1) Households with Energy Burden which exceeds the median energy burden of income-eligible Households [~~households~~] characterized by the Department as experiencing high energy burden. The Department calculates energy burden by dividing home energy costs by the Household's [~~household's~~] gross income.

(2) Households with annual energy expenditures which exceed the median home expenditures for income-eligible Households [~~households~~] are characterized by the Department as high residential energy users [~~consumers~~].

(h) Homeowners and renters will be treated equitably under all programs funded in whole or in part from LIHEAP funds. For those renters who pay heating and/or cooling bills as part of their rent, the Subrecipient [~~subrecipient~~] shall make special efforts to determine the portion of the rent that constitutes the fuel heating and/or cooling payment. If "sub metering" is not available, the Subrecipient [~~subrecipient~~] shall exercise care when negotiating with the landlords so the cost of utilities quoted is in line with the consumption for similar residents of the community. If the Subrecipient [~~subrecipient~~] pays the landlord, then the landlord shall furnish evidence that he/she has paid the bill and the amount of assistance must be deducted from the rent, if the utility payment is not stated separately from the rent. An agreement stating the terms of the payment negotiations must be signed by the landlord.

(i) A Household [~~household~~] unit cannot be served if the meter is utilized by another Household [~~household~~].

§5.408. Service Delivery Plan.

Subrecipients are required to submit on an annual basis a Department formatted Service Delivery Plan (SDP), which includes information on how they plan to implement CEAP in their service area. [~~Format for the Service Delivery Plan, may change between program years.~~] The Department will notify CEAP Subrecipients when the SDP template and the annual updated forms are [~~format changes are made and when updates will be~~] posted on the Department's website.

§5.421. Client Education.

Subrecipients [~~The subrecipients~~] must provide an energy-related needs assessment and referrals, budget counseling, and energy conservation education to each CEAP client. Subrecipients may provide education to identify energy waste, manage Household [~~household~~] energy use, and strategies to promote energy savings. Subrecipients are encouraged to use oral, written, and visual educational materials.

§5.422. General Assistance and Benefit Levels.

(a) Subrecipients shall not discourage anyone from applying for CEAP assistance. Subrecipients shall provide all potential clients with opportunity to apply for LIHEAP programs.

(b) CEAP provides assistance to targeted beneficiaries, with priority given to the elderly, persons with disabilities, families with young children; Households [~~households~~] with the highest energy costs or needs in relation to income, and Households [~~households~~] with high energy consumption.

(c) CEAP includes activities, as defined in Assurances 1-16 in Title XXVI of the Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35), as amended; such as education; and financial assistance to help very low- and extremely low-income consumers reduce their utility bills to an affordable level. CEAP services include energy education, needs assessment, budget counseling (as it pertains to energy needs), utility payment assistance; [~~crisis related~~] repair of existing heating and cooling units, and crisis-related purchase of portable heating and cooling units.

(d) Sliding scale benefit for all CEAP components:

(1) Benefit determinations are based on the Household's [~~household's~~] income, the Household [~~household~~] size, the energy cost and/or the need of the Household [~~household~~], and the availability of funds;

(2) Energy assistance benefit determinations will use the [~~following~~] sliding scale described in subparagraphs (A) - (C) of this paragraph:

(A) Households with Incomes of 0 to 50% of Federal Poverty Guidelines may receive an amount needed to address their energy payment shortfall not to exceed $1,000 [~~$1,200~~];

(B) Households with Incomes of 51% to 75% of Federal Poverty Guidelines may receive an amount needed to address their energy payment shortfall not to exceed $900 [~~$1,100~~]; and

(C) Households with Incomes of 76% to at or below 125% of Federal Poverty Guidelines may receive an amount needed to address their energy payment shortfall not to exceed $800 [~~$1,000~~]; and

(3) A Household [~~household~~] may receive [~~crisis-related~~] repair of existing heating and cooling units[~~, and/or crisis-related purchase of portable heating and cooling units~~] not to exceed $2,500. Households that include at least one member that is elderly, disabled, or a child age 5 or younger, may receive either repair of existing heating and cooling units or crisis-related purchase of portable heating and cooling units not to exceed $2,500.

(e) Subrecipient shall not establish lower local limits of assistance for any component.

(f) Total maximum possible annual Household [~~household~~] benefit (all allowable benefits [~~components~~] combined) equals $4,500 [~~$6,100~~].

(g) Subrecipient shall determine client eligibility for utility payments and/or retrofit based on the agency's Household [~~household~~] priority rating system and Household's [~~household's~~] income as a percent of poverty.

(h) Subrecipients shall provide only the [~~following~~] types of assistance described in paragraphs (1) - (11) of this subsection with funds from CEAP:

(1) Payment to vendors and suppliers of fuel/utilities, goods, and other services, such as [~~electrical wiring, propane or butane tanks, and lines, etc. for~~] past due or current bills related to the procurement of energy for heating and cooling needs of the residence, not to include security lights and other items unrelated to energy assistance;

(2) Payment to vendors--only one energy bill payment per month [~~as required by component~~];

(3) Needs assessment and energy conservation tips, coordination of resources, and referrals to other programs;

[~~(4) Energy assistance to low-income elderly and disabled individuals most vulnerable to high cost of energy for heating and cooling needs of the residence;~~]

(4) [~~(5)~~] Payment of water bills only when such costs include expenses from operating an evaporative water cooler unit or

when the water bill is an inseparable part of a utility bill. As a part of the intake process, outreach, and coordination, the Subrecipient [subrecipient] shall confirm that a client owns an operational evaporative cooler and has used it to cool the dwelling within sixty (60) days prior to application. Payment of other utility charges such as wastewater and waste removal are allowable only if these charges are an inseparable part of a utility bill. Documentation from vendor is required. Whenever possible, Subrecipient [subrecipient] shall negotiate with the utility providers to pay only the "home energy"--heating and cooling--portion of the bill;

(5) [(6)] Energy bills already paid [by householders] may not be reimbursed by the program;

(6) [(7)] Payment of reconnection fees in line with the registered tariff filed with the Public Utility Commission and/or Texas Railroad Commission. Payment cannot exceed that stated tariff cost. Subrecipient shall negotiate to reduce the costs to cover the actual labor and material and to ensure that the utility does not assess a penalty for delinquency in payments;

(7) [(8)] Payment of security deposits only when state law requires such a payment, or if the Public Utility Commission or Texas Railroad Commission has listed such a payment as an approved cost, and where required by law, tariff, regulation, or a deferred payment agreement includes such a payment. Subrecipients shall not pay such security deposits that the energy provider will eventually return to the client;

(8) [(9)] While rates and repair charges may vary from vendor to vendor, Subrecipient shall negotiate for the lowest possible payment. Prior to making any payments to an energy vendor a Subrecipient shall have a signed vendor agreement on file from the energy vendor receiving direct LIHEAP payments from the Subrecipient;

(9) [(10)] Subrecipient may make payments to landlords on behalf of eligible renters who pay their utility and/or fuel bills indirectly. Subrecipient shall notify each participating Household [household] of the amount of assistance paid on its behalf. Subrecipient shall document this notification. Subrecipient shall maintain proof of utility or fuel bill payment. Subrecipient shall ensure that amount of assistance paid on behalf of client is deducted from client's rent; [and]

(10) [(11)] In lieu of deposit required by an energy vendor, Subrecipient may make advance payments. The Department does not allow LIHEAP expenditures to pay deposits, except as noted in paragraph (6) [(7)] of this subsection. Advance payments may not exceed an estimated two months' billings; and[. Funds for the Texas CEAP shall not be used to weatherize dwelling units, for medicine, food, transportation assistance (i.e., vehicle fuel), income assistance, or to pay for penalties or fines assessed to clients.]

(11) Funds for the Texas CEAP shall not be used to weatherize dwelling units, for medicine, food, transportation assistance (i.e., vehicle fuel), income assistance, or to pay for penalties or fines assessed to clients.

§5.423. Household Crisis Component.

(a) A bona fide Household [household] crisis exists when extraordinary events or situations resulting from extreme weather conditions and/or fuel supply shortages or a terrorist attack have depleted or will deplete Household [household] financial resources and/or have created problems in meeting basic Household [household] expenses, particularly bills for energy so as to constitute a threat to the well-being of the Household [household], particularly the elderly, the disabled, or children age 5 and younger.

(b) A utility disconnection notice may constitute a Household [household] crisis. Assistance provided to Households based on a utility disconnection notice is limited to two (2) payments per year. Weather criteria is not required to provide assistance due to a disconnection notice.

(c) Crisis assistance for one Household [household] cannot exceed the maximum allowable benefit level in one year. Crisis assistance payments cannot exceed the minimum amount needed to resolve the crisis. If the client's crisis requires more than the Household [household] limit to resolve, it exceeds the scope of this program. If the crisis exceeds the Household [household] limit, Subrecipient [subrecipient] may pay up to the Household [household] limit but the rest of the bill will have to be paid from other funds to resolve the crisis. Payments may not exceed client's actual utility bill. The assistance must result in resolution of the crisis.

(d) Where necessary to prevent undue hardships from a qualified crisis, Subrecipients [subrecipients] may directly issue vouchers to provide:

(1) Temporary shelter not to exceed the annual Household [household] expenditure limit for the duration of the contract period in the limited instances that supply of power to the dwelling is disrupted--causing temporary evacuation;

(2) Emergency deliveries of fuel up to 250 gallons per crisis per Household [household], at the prevailing price. This benefit may include coverage for tank pressure testing [safety precautions, including propane or butane tank repair or replacement--up to the maximum household benefit];

(3) Service and repair of existing heating and cooling units [or purchase of portable heating/cooling units (portable electric heaters are allowable only as a last resort)] not to exceed $2,500 during the contract period. Documentation of service/repair and related warranty must be included in the client file[. Portable air conditioning and heating units may be purchased for households that include at least one member that is elderly, disabled, or a child aged 5 or younger when Subrecipient has met local weather crisis criteria];

(4) Portable air conditioning/evaporative coolers and heating units (portable electric heaters are allowable only as a last resort) may be purchased for households that include at least one member that is elderly, disabled, or a child age 5 or younger, when Subrecipient has met local weather crisis criteria;

(5) [(4)] Purchase of more than two portable heating/cooling units per Household requires [household will require] prior written approval from the Department;

(6) Purchase of portable heating/cooling units which voltage exceeds 110 volt requires prior written approval from the Department;

(7) [(5)] Replacement of central systems and combustion heating units is not an approved use of crisis funds; and

(8) [(6)] Portable heating/cooling units must be Energy Star® and compliant with the [or] International Residential Code (IRC) [compliant].

(e) Crisis funds, whether for emergency fuel deliveries, repair of existing heating and cooling units, purchase of portable heating/cooling units, or temporary shelter, shall be considered part of the total maximum Household [household] allowable assistance.

(f) When natural disasters result in energy supply shortages or other energy-related emergencies, LIHEAP will allow home energy related expenditures for [the following]:

(1) Costs to temporarily shelter or house individuals in hotels, apartments or other living situations in which homes have been

destroyed or damaged, i.e., placing people in settings to preserve health and safety and to move them away from the crisis situation;

(2) Costs for transportation (such as cars, shuttles, buses) to move individuals away from the crisis area to shelters, when health and safety is endangered by loss of access to heating or cooling;

(3) Utility reconnection costs;

(4) Blankets, as tangible benefits to keep individuals warm;

(5) Crisis payments for utilities and utility deposits; and

(6) Purchase of fans, air conditioners and generators. The number, type, size and cost of these items may not exceed the minimum needed to resolve the crisis.

(g) Time Limits for Assistance--Subrecipients shall ensure that for clients who have already lost service or are in immediate danger of losing service, some form of assistance to resolve the crisis shall be provided within a 48-hour time limit (18 hours in life-threatening situations). The time limit commences upon completion of the application process. The application process is considered to be complete when an agency representative accepts an application and completes the eligibility process. [~~For applications for assistance received from these clients on Fridays after 12:00 p.m. local time, the application process must be completed prior to 12:00 p.m. local time on the following Monday.~~]

(h) Subrecipient [~~Subrecipients~~] must maintain written documentation in client files showing crises resolved within appropriate timeframes. The Department may disallow improperly documented expenditures.

§5.430. Allowable Subrecipient Administrative and[~~,~~] Assurance 16 Activities[~~, and Direct Services Support~~] Expenditures.

(a) Allowable Administrative Costs for administrative activities may include planning, budgeting and accounting; client intake, establishing and directing policies, goals, and objectives, not unique to the mission and goals of LIHEAP. Subrecipients earn administrative budget share based on expenditure of direct services funds. The Department calculates funds available for Subrecipient [~~subrecipient~~] administrative activities as a percentage of Direct Services expenditures.

(b) Allowable Assurance 16 Activities costs may include services that encourage and enable Households [~~households~~] to reduce their home energy needs and thereby the need for energy assistance, including needs assessments, counseling, and assistance with energy vendors.

[~~(c) Allowable Expenditures under Direct Services Support may include client intake, salaries, fringe benefits, and travel expenditures of staff when conducting outreach to eligible households material and printing costs associated with outreach and targeting to eligible households.~~]

(c) [~~(d)~~] [~~Direct Services Support and~~] Assurance 16 Activities do not include computer purchases and related costs. These belong to Administration. Time/Expenditure allocation [~~Allocation~~] for Subrecipients [~~subrecipients~~] shall demonstrate and document that they separately allocated the appropriate share of [~~Direct Services Support~~/]Assurance 16 Activities time and expenditures to both outreach and targeting.

[~~(e) The Department and its subrecipients use the Uniform Grant Management Standards, OMB Circular A-87 for local governments or OMB Circular A-122 for non-profits for determination of allowable and allocable costs.~~]

(d) [~~(f)~~] To ensure fiscal compliance for this program, the Department may at the minimum use the [~~following~~] fiscal controls described in paragraphs (1) - (3) of this subsection:

(1) review annual audits;

(2) monitor fiscal records; and

(3) review Monthly Expenditure and Performance Reports.

(e) [~~(g)~~] The Department staff may monitor LIHEAP programs through monthly performance reports and periodic on-site visits using a standard monitoring instrument [~~(copy available on the Department's website)~~] for each program, designed to identify the agency's strengths and weaknesses. A risk assessment process will guide scheduling of visits to ensure that agencies ranking highest in risk will be monitored first.

(f) [~~(h)~~] The Department and its Subrecipients [~~subrecipients~~] shall cooperate in all audits and maintain records in acceptable format for audit purposes and will cooperate with any state or federal investigations.

§5.431. Payments to Subcontractors and Vendors.

(a) A Department approved bi-annual vendor agreement is required to be implemented by the Subrecipient [~~subrecipient~~] and shall contain assurances as to fair billing practices, delivery procedures, and pricing procedures for business transactions involving LIHEAP beneficiaries [~~recipients~~]. These agreements are subject to monitoring procedures performed by the Department staff.

(b) Subrecipient shall maintain proof of payment to Subcontractors [~~subcontractors~~] and vendors as required by OMB Circulars.

(c) Subrecipient [~~The subrecipients~~] shall notify each participating Household [~~household~~] of the amount of assistance paid on its behalf. Subrecipient shall document this notification.

(d) Subrecipients shall use the [~~The~~] vendor payment method [~~will be used by subrecipients~~] for CEAP components. Subrecipient shall not make cash payments directly to eligible Household [~~household~~] for any of the CEAP components.

(e) Payments to vendors for which a valid vendor agreement is not in place may be subject to disallowed costs unless prior written approval is obtained from the Department.

§5.432. Outreach, Accessibility, and Coordination.

(a) The Department may continue to develop interagency collaborations with other low-income program offices and energy providers to perform outreach to targeted groups.

(b) Subrecipients shall conduct outreach activities.

[~~(c) Subrecipients shall accept applications at sites that are geographically accessible to all households requesting assistance.~~]

(c) [~~(d)~~] Outreach activities may include:

(1) providing information through home visits, site visits, group meetings, or by telephone for disabled low-income persons;

(2) distributing posters/flyers and other informational materials at local and county social service agencies, offices of aging, Social Security offices, etc.;

(3) providing information on the program and eligibility criteria in articles in local newspapers or broadcast media announcements;

(4) coordinating with other low-income services to provide LIHEAP information in conjunction with other programs;

(5) providing information on one-to-one basis for applicants in need of translation or interpretation assistance;

(6) providing LIHEAP applications, forms, and energy education materials in English and/or Spanish (or other appropriate language);

(7) working with energy vendors in identifying potential applicants;

(8) assisting applicants to gather needed documentation; and

(9) mailing information and applications.

(d) Subrecipients shall accept applications at sites that are geographically and physically accessible to all Households requesting assistance. If Subrecipient's office is not accessible, Subrecipient shall make reasonable accommodations to ensure that all Households can apply for assistance.

(e) Subrecipients shall coordinate with other social service agencies through cooperative agreements to provide services to client Households [~~households~~]. Cooperative agreements must clarify procedures, roles, and responsibilities of all involved entities.

(f) Subrecipients shall coordinate with other energy related programs. Specifically, Subrecipient [~~subrecipient~~] shall make documented referrals to the local WAP Subrecipient [~~subrecipient~~].

(g) Subrecipients shall coordinate with local energy vendors to arrange for arrearage reduction, reasonably reduced payment schedules, or cost reductions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 12, 2012.

TRD-201205341
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 475-3916

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10 TAC §5.424, §5.425

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Housing and Community Affairs (the "Department") proposes the repeal of 10 TAC Chapter 5, Subchapter D, §5.424 and §5.425, concerning the Comprehensive Energy Assistance Program (CEAP). The purpose of the proposed repeal is to remove the Co-Payment and Elderly and Disabled components and to consolidate them into a more effective component under the CEAP program. A proposed new §5.424, concerning Utility Assistance Component, is published concurrently in this issue of the *Texas Register.*

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repeal will be to develop a new rule to increase efficiency within the CEAP. There will not be any economic cost to any individuals required to comply with the repeal.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held from October 26, 2012, to November 26, 2012, to receive input on the repeal. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941; by email to the following address: cadrulecomments@tdhca.state.tx.us; or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 26, 2012.

STATUTORY AUTHORITY. The repeal is proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

The proposed repeal affects no other code, article, or statute.

§5.424. Co-Payment Component.

§5.425. Elderly and Disabled Component.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 12, 2012.

TRD-201205331
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 475-3916

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10 TAC §5.424

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 5, Subchapter D, §5.424, concerning the Comprehensive Energy Assistance Program (CEAP), Utility Assistance Component. The purpose of the proposed new section is to consolidate the Co-Payment and Elderly and Disabled components into a more effective component under the CEAP program.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section

will be to develop a new rule to increase efficiency within the CEAP. There will be no economic cost to any individuals required to comply with the new section.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held from October 26, 2012, to November 26, 2012, to receive input on the new section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941; by email to the following address: cadrulecomments@tdhca.state.tx.us; or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 26, 2012.

STATUTORY AUTHORITY. The new section is proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

The proposed new section affects no other code, article, or statute.

§5.424. Utility Assistance Component.

(a) Subrecipients may use home energy payments to assist low-income households to reduce their home energy costs. Subrecipients shall combine home energy payments with energy conservation tips, participation by utilities, and coordination with other services in order to assist low-income households to reduce their home energy needs.

(b) Subrecipients must make payments directly to vendors and/or landlords on behalf of eligible households.

(c) Subrecipients may make utility payments on behalf of households based on the previous twelve (12) month's home energy consumption history, including allowances for cost inflation. If a twelve (12) month's home energy consumption history is unavailable, Subrecipient may base payments on current program year's bill. Subrecipients will note such exceptions in client files. Benefit amounts exceeding the actual bill shall be treated as a credit for the client with the utility company.

(d) Households that include at least one member that is elderly, disabled or a child age 5 or younger may receive benefits to cover up to 100% of the eight highest remaining bills within the contract year as long as the cost does not exceed the maximum annual benefit. First payment may include 100% of utility bill including arrears. Elderly households include at least one member age sixty (60) or above. Disabled households include at least one member living with a disability.

(e) Households that do not contain at least one member that is elderly, disabled, or a child age 5 or younger may receive benefits to cover up to 100% of the 6 highest remaining bills within the contract year as long as the cost does not exceed the maximum annual benefit. First payment may include 100% of utility bill including arrears.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 12, 2012.

TRD-201205338

Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 475-3916

SUBCHAPTER F. WEATHERIZATION ASSISTANCE PROGRAM DEPARTMENT OF ENERGY

10 TAC §5.601

The Texas Department of Housing and Community Affairs (the "Department") proposes an amendment to 10 TAC Chapter 5, Subchapter F, §5.601, concerning the Weatherization Assistance Program Department of Energy. The purpose of the proposed amendment is to correct the section reference to 10 TAC Chapter 5, Community Affairs Programs, Subchapter A, General Provisions, §5.3, relating to Cost Principles and Administrative Requirements.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amendment is in effect, enforcing or administering the amendment does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendment is in effect, the public benefit anticipated as a result of the amendment will be to correctly reference a section. There will not be any economic cost to any individuals required to comply with the amended section.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held from October 26, 2012, to November 26, 2012, to receive input on the amendment. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941; by email to the following address: cadrulecomments@tdhca.state.tx.us; or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 26, 2012.

STATUTORY AUTHORITY. The amendment is proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

The proposed amended section affects no other code, article, or statute.

§5.601. DOE Cost Principles and Administrative Requirements.

In addition to cost principles and administrative requirements listed in §5.3 [~~§5.2~~] of this chapter (relating to Cost Principles and Administrative Requirements), Subrecipients administering DOE programs must also adhere to 10 CFR Part 440 or DOE WAP rules, 10 CFR Part 600 and the International Residential Code.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 12, 2012.

TRD-201205339
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 475-3916

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SUBCHAPTER I. WEATHERIZATION ASSISTANCE PROGRAM DEPARTMENT OF ENERGY AMERICAN RECOVERY AND REINVESTMENT ACT (WAP ARRA)

10 TAC §§5.900 - 5.905

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Housing and Community Affairs (the "Department") proposes the repeal of 10 TAC Chapter 5, Subchapter I, §§5.900 - 5.905, concerning the Weatherization Assistance Program Department of Energy American Recovery and Reinvestment Act (WAP ARRA). The purpose of the proposed repeal is to reflect the end of the WAP ARRA program in Texas.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the repeal will be in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the repeal will be in effect, the public benefit anticipated as a result of the repeal will be to eliminate rules for a nonexistent program and effectively close out the WAP ARRA program. There will not be any economic cost to any individuals required to comply with the repeal.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 26, 2012 to November 26, 2012, to receive input on the repeal. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by email to the following address: cadrulecomments@tdhca.state.tx.us, or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 26, 2012.

STATUTORY AUTHORITY. The repeal is proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules, and §2306.097, which specifically authorizes the Department to adopt rules to govern the administration of the WAP.

The proposed repeal affects no other code, article, or statute.

§5.900. Deobligation and Reobligation of Funds for Department of Energy Weatherization Assistance Program under the American Recovery and Reinvestment Act.

§5.901. Definitions.

§5.902. Criteria for Deobligation of Fund Award.

§5.903. Notification and Action Plan.

§5.904. Deobligation and Other Mitigating Actions.

§5.905. Reobligation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 11, 2012.

TRD-201205318
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 475-3916

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PART 6. TEXAS DEPARTMENT OF RURAL AFFAIRS

CHAPTER 256. ADMINISTRATION

The Texas Department of Agriculture (department) proposes the repeal of 10 TAC §§256.1 - 256.15, 256.100, 256.200, 256.300, 256.400, 256.500, and 256.600. Chapter 256, Subchapter A, concerning the management policies of the Texas Department of Rural Affairs (TDRA) board of directors and executive director, and Subchapter B, concerning TDRA general policies and procedures, are proposed for repeal because the sections in that chapter are no longer needed. Senate Bill 1, 82nd Legislature, First Called Special Legislative Session, 2011 (Senate Bill 1), effective September 1, 2011, abolished TDRA and transferred its respective powers, duties, functions, programs and activities to the department. The board of directors was also abolished by Senate Bill 1, eliminating the need for Subchapters A and B. While TDRA programs were transferred to TDA and its Office of Rural Affairs and are administered by that Office within TDA, the general policies and procedures included in Subchapter B are unnecessary, because those are covered in similar policies and procedures of the department.

Rick Rhodes, Administrator for Rural Affairs, has determined that for the first five years the repeals are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Mr. Rhodes also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be the elimination of unnecessary rules. For the first five-year period the repeals are in effect, there will be no economic cost for micro-businesses,

small businesses or individuals who are required to comply with the repeals as proposed.

Written comments on the proposal may be submitted to Rick Rhodes, Administrator for Rural Affairs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Written comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

SUBCHAPTER A. MANAGEMENT POLICIES OF BOARD AND EXECUTIVE DIRECTOR

10 TAC §§256.1 - 256.15

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Agriculture or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed under the Texas Government Code, §487.351, as amended by Senate Bill 1, 82nd Legislature, First Called Special Legislative Session, 2011, which provides the department with the authority to administer the state's allocation of federal funds provided under the community development block grant nonentitlement program authorized by Title I of the Housing and Community Development Act of 1974 (42 U.S.C. Section 5301 et seq.), and to allocate such funds to eligible counties and municipalities under department rules; and Texas Agriculture Code, §12.016, which provides the department with the authority to adopt rules to administer its duties under the Code.

The code affected by this proposal is Texas Government Code, Chapter 487.

§256.1. Executive Director.
§256.2. Staff.
§256.3. Chair.
§256.4. Vice-Chair.
§256.5. Secretary.
§256.6. Vacancies in the Board.
§256.7. Board Meetings.
§256.8. Order of Business.
§256.9. Committees.
§256.10. Independent Contractors.
§256.11. Confidentiality.
§256.12. Duties of the Executive Director.
§256.13. Invalid Portions.
§256.14. Actions Requiring Board Approval.
§256.15. Public Hearings.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205359
Dolores Alvarado Hibbs
General Counsel, Texas Department of Agriculture
Texas Department of Rural Affairs
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 463-4075

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SUBCHAPTER B. GENERAL POLICIES AND PROCEDURES

10 TAC §§256.100, 256.200, 256.300, 256.400, 256.500, 256.600

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Agriculture or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed under the Texas Government Code, §487.351, as amended by Senate Bill 1, 82nd Legislature, First Called Special Legislative Session, 2011, which provides the department with the authority to administer the state's allocation of federal funds provided under the community development block grant nonentitlement program authorized by Title I of the Housing and Community Development Act of 1974 (42 U.S.C. Section 5301 et seq.) and to allocate such funds to eligible counties and municipalities under department rules; and Texas Agriculture Code, §12.016, which provides the department with the authority to adopt rules to administer its duties under the Code.

The code affected by this proposal is Texas Government Code, Chapter 487.

§256.100. Definitions.
§256.200. Negotiated Rulemaking.
§256.300. Alternative Dispute Resolution.
§256.400. Collections.
§256.500. Appeals Process to Award of Contract.
§256.600. Department Complaint System.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205360
Dolores Alvarado Hibbs
General Counsel, Texas Department of Agriculture
Texas Department of Rural Affairs
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 463-4075

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TITLE 16. ECONOMIC REGULATION

PART 8. TEXAS RACING COMMISSION

CHAPTER 311. OTHER LICENSES

The Texas Racing Commission proposes amendments to 16 TAC §§311.1, 311.2, 311.3, 311.5, 311.101, and 311.102. The sections relate to occupational licensing requirements, the application procedure to acquire an occupational license, background investigations, license categories and fees, and licenses for horse owners and greyhound owners. The amendment to §311.1 prohibits an association from employing an unlicensed employee to work in an occupation that affords the employee an opportunity to influence racing with pari-mutuel wagering or to work in an occupation that provides significant access to the backside or restricted areas of a racetrack. The amendment to §311.2 clarifies that applicants for a new license or for a license renewal may submit the application through the Texas OnLine portal. The amendment to §311.3 deletes the provisions that

permit the waiver of fingerprint requirements for occupational licenses. The amendment to §311.5 corrects an error in the rule by setting the licensing fee for a multiple owner's license at $105, not $100. The amendments to §311.101 and §311.102 add language to treat an incomplete application for a horse or greyhound owner's license as "pending" unless the applicant actually tries to use the license by entering an animal in a race.

Chuck Trout, Executive Director, has determined that for the first five-year period the amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing the amendments.

Mr. Trout has determined that for each year of the first five years the amendment to §311.1 is in effect the anticipated public benefit will be conformity with changes made to the Texas Racing Act by the Texas Legislature in HB 2271, 81st Regular Session.

Mr. Trout has determined that for each year of the first five years the amendment to §311.2 is in effect the anticipated public benefit will be to increase the ability of the public to apply for an occupational license over the Internet.

Mr. Trout has determined that for each year of the first five years the amendment to §311.3 is in effect the anticipated public benefit will be to remove rule provisions which are no longer in effect. The Federal Bureau of Investigation (FBI) has informed the Commission that racing jurisdictions may not share with other jurisdictions the results of any FBI criminal or non-criminal history checks. As a result, there is no longer the ability to waive fingerprinting requirements based on the results of a previous background check conducted in another jurisdiction.

Mr. Trout has determined that for each year of the first five years the amendment to §311.5 is in effect the anticipated public benefit will be to correct an error in the table of fees for occupational licenses. With the exception of the Multiple Owner license, multi-year license fees are set as a straight multiple of the one-year fee. This change will maintain a consistent approach towards the establishment of multi-year license fees.

Mr. Trout has determined that for each year of the first five years the amendments to §311.101 and §311.102 are in effect the anticipated public benefit will be to allow additional time for individuals to complete an application for a horse or greyhound owner's license without losing the application fee. Currently, emergency licenses are issued on incomplete applications as soon as they are received. This results in the loss of the licensing fee by the applicant if he or she does not complete the application within 21 days, even if the applicant has made no effort to use the license. The change will treat incomplete applications as "pending" unless the applicant actually tries to use the license by entering an animal in a race.

The amendments will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendments.

All comments or questions regarding the proposed amendments may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

SUBCHAPTER A. LICENSING PROVISIONS
DIVISION 1. OCCUPATIONAL LICENSES

16 TAC §§311.1 - 311.3, 311.5

The amendments are proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, §7.01, which requires the Commission to categorize the occupations of racetrack employees, and §7.02, which requires the Commission to specify by rule the qualifications and experience required for licensing in each category of occupation.

The amendment implements Texas Revised Civil Statutes Annotated, Article 179e.

§311.1. Occupational Licenses.

(a) License Required.

(1) A person other than a patron may not participate in racing at which pari-mutuel wagering is conducted unless the person has a valid license issued by the Commission. Any individual who enters an animal is deemed to be a participant in racing.

(2) A licensee may not employ a person to work at a racetrack at which pari-mutuel wagering is conducted unless the person has a valid license issued by the Commission.

(3) An association may not employ a person who works in an occupation that affords the employee an opportunity to influence racing with pari-mutuel wagering, or who will likely have significant access to the backside or restricted areas of a racetrack, unless the person has a valid license issued by the Commission.

(b) Duration of License.

(1) Except as provided in paragraph [~~subsection (b)~~](2) of this subsection [~~section~~], an occupational license expires one year after the last day of the month in which the license was issued.

(2) - (3) (No change.)

(c) - (d) (No change.)

§311.2. Application Procedure.

(a) (No change.)

(b) Application Site.

(1) Except as provided in paragraphs [~~subsection (b)~~](2) and [~~(b)~~](3) of this subsection [~~section~~], an applicant for an occupational license must file the appropriate application form and related documents at the licensing office at a licensed racetrack.

(2) An applicant for the following occupational license types may file the appropriate application form and related documents by mail to the main office of the Commission in Austin; kennel owner, kennel owner/owner, kennel owner/owner/trainer, kennel owner/trainer, owner, owner/trainer, trainer, multiple owner/stable/farm registration, training facility employee, and training facility general manager/CEO.

(3) An applicant for [~~who is eligible to renew~~] an occupational license that is available through the Texas OnLine portal may submit [~~file~~] the required application information through the Texas OnLine portal.

(c) - (e) (No change.)

§311.3. Information for Background Investigation.

(a) Fingerprint Requirements and Procedure.

(1) - (3) (No change.)

(4) A person who desires to renew an occupational license must:

(A) - (B) (No change.)

(C) if the applicant's original fingerprints are classified and on file with the Department of Public Safety, the applicant must pay a processing fee to resubmit the original fingerprints in lieu of submitting another set of fingerprints under paragraph (5) [~~(6)~~] of this subsection. The processing fee shall be equal to the amount necessary to reimburse the Department of Public Safety for obtaining criminal history records under subsection (b) of this section.

[~~(5) Waiver.~~]

[~~(A) Pursuant to Texas Civil Statutes, Article 179e, §7.10, the Commission will waive the fingerprint requirements in this section for an applicant for an owner or trainer license if:~~]

[~~*(i)* the individual presents proof of a valid owner or trainer license issued in a racing jurisdiction that requires the submission of fingerprints to the Federal Bureau of Investigation and the Commission verifies that fingerprints were submitted by that jurisdiction for the applicant within the three years preceding the date of the application in Texas; and~~]

[~~*(ii)* the applicant's permanent residence is outside the State of Texas.~~]

[~~(B) This subsection does not apply to an applicant who:~~]

[~~*(i)* has a criminal history in another state, as revealed by a report by the Federal Bureau of Investigation or other reliable criminal information sources;~~]

[~~*(ii)* maintains a residence or is employed, whether self-employed or otherwise, in Texas; or~~]

[~~*(iii)* obtains a license badge issued by the Commission which gives the applicant access to a restricted area on association grounds.~~]

[~~(C) Notwithstanding a waiver of the fingerprint requirements under this subsection, the Commission reserves the right, at its sole discretion, to require the submission of fingerprints after a license has been issued.~~]

(5) [~~(6)~~] If an applicant for a license or license renewal is required to submit fingerprints under this section, the applicant must also submit a fingerprinting fee and a processing fee equal to the amounts necessary to reimburse the Commission and the Department of Public Safety for obtaining criminal history records under subsection (b) of this section.

(b) (No change.)

§311.5. License Categories and Fees.

(a) - (c) (No change.)

(d) The fee for an occupational license is as follows:

Figure: 16 TAC §311.5(d)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205363
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 833-6699

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SUBCHAPTER B. SPECIFIC LICENSES

16 TAC §311.101, §311.102

The amendments are proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §7.02, which requires the Commission to specify by rule the qualifications and experience required for licensing in each category of occupation.

The amendments implement Texas Revised Civil Statutes Annotated, Article 179e.

§311.101. Horse Owners.

(a) - (f) (No change.)

(g) Emergency License.

(1) - (3) (No change.)

(4) If an owner submits an incomplete application for an owner's license, the application will remain in pending status until:

(A) the owner submits any additional information required to process the application;

(B) the application expires in accordance with the term of the applied-for license; or

(C) a horse is entered in the owner's name or in the name of a multiple owner of which the owner is a member, in which case the pending license will be presumed to be a request for an emergency license.

[~~(4) An application for an owner's license submitted to the Commission's main office in Austin that is incomplete will be presumed to be a request for an emergency license and an emergency license may be granted.~~]

(5) A license issued under this section expires on the 21st day after the date the emergency owner's license is issued. An owner may obtain only one emergency license per year. An emergency license cannot be issued if the owner failed to complete the prior licensing process.

(6) (No change.)

§311.102. Greyhound Owners.

(a) - (b) (No change.)

(c) Emergency License.

(1) - (3) (No change.)

(4) If an owner submits an incomplete application for an owner's license, the application will remain in pending status until:

(A) the owner submits any additional information required to process the application;

(B) the application expires in accordance with the term of the applied-for license; or

(C) a greyhound is entered in the owner's name or in the name of a multiple owner of which the owner is a member, in which case the pending license will be presumed to be a request for an emergency license.

~~[(4) An application for an owner's license submitted to the Commission's main office in Austin that is incomplete will be presumed to be a request for an emergency license and an emergency license may be granted.]~~

(5) A license issued under this section expires on the 21st day after the date the emergency owner's license is issued. An owner may obtain only one emergency license per year. An emergency license cannot be issued if the owner failed to complete the prior licensing process.

(d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205364
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 833-6699

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CHAPTER 321. PARI-MUTUEL WAGERING

The Texas Racing Commission (Commission) proposes amendments to 16 TAC §§321.15, 321.29, 321.31, 321.46, 321.215, 321.320, and 321.321. The Commission also proposes the repeal of Subchapter B, comprised of §§321.101, 321.103, 321.105, 321.107, 321.121, 321.123 - 321.125, 321.127, 321.131, 321.133, 321.135, 321.137, 321.139, 321.141, and 321.143. Existing Subchapter B, Divisions 1 - 3, will be replaced with a single new rule, §321.101. These sections relate to: the licensing of totalisator companies; the information that must be printed on the face of each mutuel ticket and voucher; payments made after a ticket machine fails to issue a paper ticket; the list of multiple wager types; the treatment of carryover pools from the super hi-five and fortune pick (n) wagers; and the requirements and operating environment of totalisator systems.

The amendment to §321.15 makes a technical correction to adjust for the proposed repeal of §321.123. The amendment to §321.29 requires that each pari-mutuel ticket be printed with a notice that it expires one year after issuance. Similarly, the amendment to §321.31 requires that a pari-mutuel voucher be printed with a notice that it expires one year after issuance. The amendment to §321.46 permits associations to modify and use their existing forms to report any payments made after a ticket machine fails to issue a ticket. It also establishes a 24-hour deadline to report the transaction to the Commission. The amendment to §321.215 makes a technical clarification by adding the super hi-five and the fortune pick (n) wagers to the list of Multiple Wagers. The amendment to §321.320 authorizes an association to have a mandatory payout of the pool in a super hi-five wager on the last day of a race meet. The amendment to §321.321 specifies that the minor pool in a fortune pick (n) wager will be combined with the major pool for that day's wagering and both pools will be added to the carryover jackpot, which is then carried forward to the next fortune pick (n) pool. The proposal to repeal each rule within Divisions 1, 2 and 3 of Chapter 321, Subchapter B, is made in conjunction with the proposal to adopt new §321.101, which adopts by reference the Totalisator Technical Standards of the Association of Racing Commissioners International (ARCI).

Chuck Trout, Executive Director, has determined that for the first five-year period the amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing the amendments, repeals, and new rule.

Mr. Trout has determined that for each year of the first five years the amendment to §321.15 is in effect the anticipated public benefit will be to increase the standardization of totalisator requirements across the nation by adopting ARCI's model rules.

Mr. Trout has determined that for each year of the first five years the amendment to §321.29 is in effect the anticipated public benefit will be to provide the public with clear notice of the date on which a mutuel ticket will expire.

Mr. Trout has determined that for each year of the first five years the amendment to §321.31 is in effect the anticipated public benefit will be to provide the public with clear notice of the date on which a mutuel voucher will expire.

Mr. Trout has determined that for each year of the first five years the amendment to §321.46 is in effect the anticipated public benefit will be to simplify the method by which associations report a payment on a winning ticket after a patron purchases the ticket, but the ticket machine fails to issue the physical ticket.

Mr. Trout has determined that for each year of the first five years the amendment to §321.215 is in effect the anticipated public benefit will be to correct the list of multiple wagers.

Mr. Trout has determined that for each year of the first five years the amendment to §321.320 is in effect the anticipated public benefit will be to increase interest in the super hi-five wager by allowing an association to establish a mandatory payout of the super hi-five pool on the last day of a race meet.

Mr. Trout has determined that for each year of the first five years the amendment to §321.321 is in effect the anticipated public benefit will be to address an issue when no one wins either the minor or major pool in a fortune pick (n) wager. The change specifies that the minor pool will be combined with the major pool for that day's wagering and both pools will be added to the carryover jackpot. The carryover jackpot is then carried forward to the next fortune pick (n) pool.

Mr. Trout has determined that for each year of the first five years the repeal of existing Subchapter B, Divisions 1 - 3, and adoption of new §321.101 is in effect the anticipated public benefit will be to increase the standardization of totalisator requirements across the nation.

The amendments, repeals, and new rule will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendments, repeals, and new rule.

All comments or questions regarding the proposal may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

SUBCHAPTER A. MUTUEL OPERATIONS
DIVISION 1. GENERAL PROVISIONS

16 TAC §321.15

The amendments are proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules to regulate wagering on greyhound races and horse races under the system known as pari-mutuel wagering.

The amendment implements Texas Revised Civil Statutes Annotated, Article 179e.

§321.15. License to Provide Totalisator Services.

(a) To provide totalisator services to an association in Texas, a totalisator company must be licensed by the Commission as a Totalisator Vendor. The license application must include:

(1) (No change.)

(2) a list of all totalisator personnel assigned to work in Texas, or on behalf of an association operating in Texas, as described in Subchapter B [~~§321.123~~] of this chapter [~~title~~] (relating to Totalisator Requirements and Operating Environment) [~~Personnel Requirements)~~];

(3) - (4) (No change.)

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205368
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 833-6699

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DIVISION 3. MUTUEL TICKETS AND VOUCHERS

16 TAC §§321.29, 321.31, 321.46

The amendments are proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules to regulate wagering on greyhound races and horse races under the system known as pari-mutuel wagering.

The amendments implement Texas Revised Civil Statutes Annotated, Article 179e.

§321.29. Mutuel Tickets.

Each mutuel ticket issued must have printed on its face:

(1) the name of the racetrack facility where the wager was placed;

(2) the name of the racetrack where the race was conducted;

(3) the number of the race;

(4) the unique computer-generated ticket number;

(5) the date the ticket was issued;

(6) the date of the race for which the ticket was issued;

(7) the number of the ticket-issuing machine;

(8) the type of pool;

(9) the number of each entry on which the wager was placed;

(10) the dollar amount of the wager; and

(11) appropriate language to indicate the expiration [~~date~~] of the ticket shall be the first anniversary of the day the ticket was purchased.

§321.31. Vouchers.

Each voucher issued must have printed on its face:

(1) the name of the racetrack facility where the voucher was issued;

(2) the unique computer-generated voucher number;

(3) the date the voucher was issued;

(4) the number of the ticket-issuing machine;

(5) the dollar amount of the voucher; and

(6) appropriate language to indicate the expiration [~~date~~] of the ticket shall be the first anniversary of the day the ticket was purchased.

§321.46. Payment on No Ticket Issue.

When a ticket issuing machine does not produce a paper ticket due to a mechanical failure, the mutuel manager may validate the wager through totalisator logs. If the transaction is a winning wager and the mutuel manager pays the patron, then the mutuel manager shall report the transaction to the Commission within 24 hours on a form prescribed by the association and approved by the executive secretary. The form must contain, at the minimum, the following: [~~Commission~~]

(1) Association name;

(2) Date and time of the machine failure;

(3) Terminal number;

(4) Bet description to include:

(A) racetrack;

(B) race number;

(C) animal number;

(D) bet type;

(E) amount wagered;

(F) total ticket cost;

(G) winning amount; and

(H) ticket serial number;

(5) Patron's name and phone number;

(6) Signature of the patron;

(7) Description of the incident;

(8) Date and time of the report; and

(9) Signature of the mutual manager.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205369
Mark Fenner
General Counsel
Texas Racing Commission
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For further information, please call: (512) 833-6699

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SUBCHAPTER B. TOTALISATOR REQUIREMENTS AND OPERATING ENVIRONMENT

DIVISION 1. FACILITIES AND EQUIPMENT

16 TAC §§321.101, 321.103, 321.105, 321.107

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Racing Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules to regulate wagering on greyhound races and horse races under the system known as pari-mutuel wagering.

The repeals implement Texas Revised Civil Statutes Annotated, Article 179e.

§321.101. Purpose.

§321.103. Facility Requirements.

§321.105. Hardware Requirements.

§321.107. Software Requirements.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205370
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 833-6699

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DIVISION 2. OPERATIONAL REQUIREMENTS

16 TAC §§321.121, 321.123 - 321.125, 321.127

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Racing Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules to regulate wagering on greyhound races and horse races under the system known as pari-mutuel wagering.

The repeals implement Texas Revised Civil Statutes Annotated, Article 179e.

§321.121. General Management Requirements.

§321.123. Personnel Requirements.

§321.124. Waivers for Technological Advancement of Off-site Processing.

§321.125. Totalisator Network.

§321.127. Data Transmission Protocols.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205371
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 833-6699

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DIVISION 3. REPORTING AND LOG REQUIREMENTS

16 TAC §§321.131, 321.133, 321.135, 321.137, 321.139, 321.141, 321.143

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Racing Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules to regulate wagering on greyhound races and horse races under the system known as pari-mutuel wagering.

§321.131. General Requirements.

§321.133. Pre-Race Reports.

§321.135. Race-by-Race Reports.

§321.137. End-of-Day Reports.
§321.139. Ad Hoc Reports.
§321.141. Special Reports.
§321.143. Logs.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205372
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 833-6699

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SUBCHAPTER B. TOTALISATOR REQUIREMENTS AND OPERATING ENVIRONMENT

16 TAC §321.101

The new rule is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules to regulate wagering on greyhound races and horse races under the system known as pari-mutuel wagering.

The rule implements Texas Revised Civil Statutes Annotated, Article 179e.

§321.101. Totalisator Requirements and Operating Environment.

Each association shall conduct wagering using a pari-mutuel system approved by the Commission. The pari-mutuel system shall operate in accordance with applicable laws and rules and meet the technical standards set forth in the Association of Racing Commissioners International Totalisator Technical Standards as amended in July 2012. Copies of the Totalisator Technical Standards are available at the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711, or at the Commission office at 8505 Cross Park Dr., #110, Austin, Texas 78754.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205373
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 833-6699

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SUBCHAPTER C. REGULATION OF LIVE WAGERING

DIVISION 1. GENERAL PROVISIONS

16 TAC §321.215

The amendment is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules to regulate wagering on greyhound races and horse races under the system known as pari-mutuel wagering.

The amendment implements Texas Revised Civil Statutes Annotated, Article 179e.

§321.215. Multiple Wagers.

(a) The following wagers are considered to be multiple two wagers for all purposes:

(1) daily double;

(2) quinella;

(3) exacta; and

(4) quinella double.

(b) The following wagers are considered to be multiple three wagers for all purposes:

(1) trifecta;

(2) twin trifecta;

(3) pick (n);

(4) select three, four, or five;

(5) superfecta; [~~and~~]

(6) tri-superfecta;[~~.~~]

(7) fortune pick (n); and

(8) super hi-five.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205374
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 833-6699

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DIVISION 2. DISTRIBUTION OF PARI-MUTUEL POOLS

16 TAC §321.320, §321.321

The amendments are proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules to regulate wagering on greyhound races and horse races under the system known as pari-mutuel wagering.

The amendments implement Texas Revised Civil Statutes Annotated, Article 179e.

§321.320. Super Hi-Five.

(a) - (g) (No change.)

(h) If on the final day of a race meeting or on a designated mandatory payout date the pool has not been distributed under subsection (b) or (c) of this section, then the net pool for that performance plus any carryover from previous performances shall be paid out in the following manner: [~~is canceled or the super hi-five pool has not been distributed, the pool shall be deposited in an interest-bearing account approved by the executive secretary. The pool plus all accrued interest shall then be carried over and added to the super hi-five pari-mutuel pool in the following race meeting on a date and performance designated by the executive secretary.~~]

(1) To those who selected first-place, second-place, third place, and fourth-place finishers in order. If there are no such wagers, then:

(2) To those who selected first-place, second-place, and third-place finishers in order. If there are no such wagers, then:

(3) To those who selected first-place and second-place finishers in order. If there are no such wagers, then:

(4) To those who selected the first-place finisher.

(i) If the final or designated mandatory payoff performance is canceled or the pool has not been distributed under subsection (h) of this section the pool shall be deposited in an interest-bearing account approved by the executive secretary. The pool plus all accrued interest shall then be carried over and added to the super hi-five pari-mutuel pool in the following race meeting on a date and performance designated by the executive secretary.

(j) [~~(i)~~] If an animal is scratched or declared a nonstarter, no further tickets may be issued designating such animal and all super hi-five tickets previously issued designating such animal shall be refunded and the money deducted from the gross super hi-five pool.

(k) [~~(j)~~] For purposes of statutory deductions and commissions, the net amount does not include any amounts carried over from any previous super hi-five pool.

(l) The association may select a distinctive name for the super hi-five, with prior approval of the executive secretary.

§321.321. Fortune Pick (n).

(a) - (f) (No change.)

(g) Fortune pick (n) with minor pool and carryover with unique wager:

(1) the entire net fortune pick (n) pool and carryover, if any, shall be distributed to the holder of a unique wager selecting the first place finisher in each of the selected fortune pick (n) contests, based upon the official order of finish. If there is no unique wager selecting the first place finisher in all fortune pick (n) contests, the minor share of the net fortune pick (n) pool shall be distributed as a single price pool to those who selected the first place finisher in the greatest number of fortune pick (n) contests; and the major share shall be added to the carryover;[~~.~~]

(2) if the fortune pick (n) minor pool cannot be distributed in accordance with paragraph (1) of this subsection, the minor pool shall be combined with the major pool and added to the previous day's carryover. The entire pool plus carryover shall be carried forward to the next fortune pick (n) pool.

(h) - (p) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205375
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 833-6699

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 5. RULES APPLYING TO PUBLIC UNIVERSITIES, HEALTH-RELATED INSTITUTIONS, AND/OR SELECTED PUBLIC COLLEGES OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER C. APPROVAL OF NEW ACADEMIC PROGRAMS AND ADMINISTRATIVE CHANGES AT PUBLIC UNIVERSITIES, HEALTH-RELATED INSTITUTIONS, AND REVIEW OF EXISTING DEGREE PROGRAMS

19 TAC §5.46

The Texas Higher Education Coordinating Board (Coordinating Board) proposes an amendment to §5.46, concerning Criteria for New Doctoral Programs. The amendment to §5.46(8)(B) is to provide an accurate reference to the section of the Texas Administrative Code requiring Coordinating Board approval prior to public colleges and universities delivering doctoral programs through distance education and/or off-campus instruction.

Dr. MacGregor M. Stephenson, Assistant Commissioner for Workforce, Academic Affairs and Research, has determined that for the first five years the amendment is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the section.

Dr. Stephenson has also determined that for each year of the first five years the amendment is in effect, the public benefit anticipated as a result of administering the section will be the clarification of the section of the Texas Administrative Code that requires Coordinating Board approval prior to public colleges and universities delivering doctoral programs through distance education and/or off-campus instruction. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There will be no impact on local employment.

Comments on the proposal may be submitted by mail to Dr. MacGregor M. Stephenson, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711; or via email to WAARcomments@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendment is proposed under the Texas Education Code, Chapter 61, Subchapter C, §61.051(j), which provides the Coordinating Board with the authority to require public colleges and universities to gain approval from the Coordinating Board prior to the delivery of doctoral programs through distance education and/or off-campus instruction.

The amendment affects the Texas Education Code, Chapter 61, Subchapter C, §61.051(j).

§5.46. Criteria for New Doctoral Programs.

New doctoral programs must meet all of the following criteria:

(1) - (7) (No change.)

(8) On-Campus Residency Expectations.

(A) (No change.)

(B) Institutions are traditionally expected to meet these provisions through substantial on-campus residency requirements. Proposals to meet them in other, non-traditional ways (e.g., to enable distant delivery of a doctoral program) must provide persuasive and thorough documentation as to how each provision would be met and evaluated for the particular program and its students. Delivery of doctoral programs through distance education and/or off-campus instruction requires prior approval of the Board as specified in §4.261(3) [~~§4.104(e)(3)~~] of this title (relating to Standards and Criteria for Distance Education Programs [~~Approval of Distance Education and Off-Campus Instruction for Public Colleges and Universities~~]).

(9) - (15) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205354
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: January 24, 2013
For further information, please call: (512) 427-6114

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CHAPTER 7. DEGREE GRANTING COLLEGES AND UNIVERSITIES OTHER THAN TEXAS PUBLIC INSTITUTIONS
SUBCHAPTER A. GENERAL PROVISIONS
19 TAC §§7.3 - 7.8, 7.10 - 7.12, 7.14

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to §§7.3 - 7.8, 7.10 - 7.12, and 7.14, concerning Degree Granting Colleges and Universities Other Than Texas Public Institutions. Generally, amendments within the revised sections standardize defined terms use, capitalization and punctuation throughout these sections.

The amendments to §7.3 include revising the definition of an agent to exclude persons employed by or representing institutions that hold a Certificate of Authorization or Authority. A definition was added for the Certificate of Registration. Definitions were added to clarify experiential learning activities, such as internships, clinical site experiences and visiting student status. These added definitions will provide clearer direction to out-of-state institutions applying for certificates based on clinicals or internships. The Conditional Certificate of Authorization was changed to Provisional Certificate of Authorization and the definition refined to clarify applicability to institutions and maximum time periods. The substantive change definition was expanded to specifically include changes in accrediting agency or status with such accrediting agency, degree or credential levels or additions of programs, degrees or credentials offered. A definition was added for a single point of contact with whom the Board will communicate institutional changes or information. Institutions are required to provide changes in designation of the single point of contact to the Board. The amendments standardize defined terms use, capitalization and punctuation.

The amendments to §7.4 revise terminology to differentiate institutional assessment from program evaluation. The amendments to §7.4 standardize defined terms use, capitalization and punctuation.

The amendments to §7.5 explain circumstances when an institution may represent transferability of credit. Language regarding specific administrative penalties was also clarified. The amendments standardize defined terms use, capitalization and punctuation.

The amendments to §7.6 change recognized accrediting agencies reporting responsibilities from annually to upon notice of continued recognition by the U.S. Department of Education or upon change in recognition status, scope or level. The amendments standardize defined terms use, capitalization and punctuation.

The amendments to §7.7 provide more specific guidance to institutions qualifying for a Certificate of Authorization. The identity of the institution's single point of contact was added to the information to be provided in the application. Requirements for Certificates of Authorization based only on providing clinicals or internships in Texas are explained. The valid time periods for both Certificates of Authorization based on clinicals or internships and Provisional Certificates of Authorization were added. Cessation of course offerings upon revocation of a Certificate of Authorization was added. Language was added to define institutions allowed to enter into a teach-out agreement with an institution which is closing. The amendments standardize defined terms use, capitalization and punctuation.

The amendments to §7.8 added the identity of the institution's single point of contact to the information to be provided in the application. Cessation of course offerings upon revocation of a Certificate of Authority was also added. Requirements for Certificate of Registration agents' fees were removed from this section and added to §7.10. Language was added to define institutions allowed to enter into a teach-out agreement with an institution which is closing. Approval of additional degree programs for Alternative Certificates of Authority was clarified. The valid time period for an Alternative Certificate of Authority was specified. A waiting period was added for reapplication after denial of an ap-

plication for an Alternative Certificate of Authority. The amendments standardize defined terms use, capitalization and punctuation.

The amendments to §7.10 reflect the definition change for agents. Fee requirements for Certificates of Registration for agents were added to this section. The amendments standardize defined terms use, capitalization and punctuation.

The amendments to §7.11 added Certificates of Authorization coverage. The expanded substantive change definition was included in the requirements for approvals of program revisions. Communication of ownership and other substantive changes through the person designated as the institution's single point of conduct was specified. The amendments standardize defined terms use, capitalization and punctuation.

The amendments to §7.12 include clearer procedures for review of degrees from institutions not eligible for Certificates of Authority. The amendments standardize defined terms use, capitalization and punctuation.

The amendments to §7.14 expand exemption of institutions offering distance education with no physical presence in Texas to institutions which have accreditation from an accrediting agency recognized by the Secretary of Education of the United States Department of Education. The section was reorganized to better explain application requirements if an institution's status changes. The amendments standardize defined terms use, capitalization and punctuation.

Dr. MacGregor M. Stephenson, Assistant Commissioner for Workforce, Academic Affairs and Research, has determined that for the first five years the amendments are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections.

Dr. Stephenson has also determined that for the first five years the amendments are in effect, the public benefits anticipated as a result of administering the sections will be to streamline and clarify requirements on institutions for Certificates of Authority, Authorization and Registration and to improve staff efficiencies. There is no effect on small businesses. There are no anticipated economic cost differences to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted by mail to Dr. MacGregor M. Stephenson, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711; or via email at WAARcomments@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, Chapter 61, Subchapters G and H, which provides the Coordinating Board with the authority to administer the laws regulating private and out-of-state public postsecondary institutions operating in Texas.

The amendments affect the Texas Education Code, Chapter 61, Subchapters G and H.

§7.3. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (3) (No change.)

(4) Agent--A person employed by or representing a post[-]secondary educational institution that does not have a Certificate of Authorization or Certificate of Authority, within or without Texas who:

(A) - (C) (No change.)

(5) Alternative Certificate of Authority--A type of Certificate [~~certificate~~] of Authority [~~authority~~] for approval of postsecondary institutions, with operations in the state of Texas, to confer degrees or courses applicable to degrees, or to solicit students for enrollment in institutions that confer degrees or courses applicable to degrees that is governed by flexible, streamlined procedures, emphasizing the importance of innovation, consumer choice, and measurable outcomes in the delivery of educational services.

(6) - (11) (No change.)

(12) Certificate of Authority--The Board's approval of postsecondary institutions (other than exempt institutions), with operations in the State [~~state~~] of Texas, to confer degrees or courses applicable to degrees, or to solicit students for enrollment in institutions that confer degrees or courses applicable to degrees.

(13) (No change.)

(14) Certificate of Registration--The Board's approval of an agent to solicit students on behalf of a private postsecondary educational institution in the State of Texas.

(15) [~~(14)~~] Certification Advisory Council--

(A) Council to advise the Board on standards and procedures related to certification of private, nonexempt postsecondary educational institutions, and to assist the Commissioner in the examination of individual applications for Certificates [~~certificates~~] of Authority [~~authority~~], and to perform other duties related to certification that the Board finds to be appropriate.

(B) The council shall consist of six members with experience in higher education, three of whom must be drawn from exempt private postsecondary institutions in Texas.

(C) The members shall be appointed for two year fixed and staggered terms.

(16) [~~(15)~~] Change of Ownership or Control--Any change in ownership or control of a career school or college or an agreement to transfer control of such institution.

(A) The ownership or control of a career school or college is considered to have changed:

(i) in the case of ownership by an individual, when more than fifty (50) percent of the institution has been sold or transferred;

(ii) in the case of ownership by a partnership or a corporation, when more than fifty (50) percent of the institution or of the owning partnership or corporation has been sold or transferred; or

(iii) when the board of directors, officers, shareholders, or similar governing body has been changed to such an extent as to significantly alter the management and control of the institution.

(B) A change of ownership or control does not include a transfer that occurs as a result of the retirement or death of the owner if transfer is to a member of the owner's family who has been directly and constantly involved in the management of the institution for a minimum of two years preceding the transfer. For the purposes of this section, a member of the owner's family is a parent, sibling, spouse, or child; spouse's parent or sibling; or sibling's or child's spouse.

(17) [~~(16)~~] Cited--Any reference to an institution in a negative finding or action by an accrediting agency.

(18) [~~(17)~~] Classification of Instructional Programs (CIP) Code--The four (4) or six (6)-digit code assigned to an approved degree program in accordance with the CIP manual published by the U.S. Department of Education, National Center for Education Statistics. CIP codes define the authorized teaching field of the specified degree program, based upon the occupation(s) for which the program is designed to prepare its graduates.

(19) Clinical Internship--This learning method, also known as "clinicals," encompasses all site-specific health professions experiential learning. Clinicals include site experiences for medical, nursing, allied health, and other health professions degree programs.

(20) [~~(18)~~] Commissioner--The Commissioner of Higher Education.

(21) [~~(19)~~] Concurrent Instruction--Students enrolled in different classes, courses, and/or subjects being taught, monitored, or supervised simultaneously by a single faculty member.

~~[(20) Conditional Certificate of Authorization--The Board's acknowledgement that an institution is qualified for an exemption, once certain specified conditions have been satisfied, from the regulations herein. This certificate will have a specific effective and expiration date determined by the nature of the conditions that must be satisfied. These conditions will be outlined in the certificate of authorization letter that accompanies the certificate.]~~

(22) [~~(21)~~] Degree--Any title or designation, mark, abbreviation, appellation, or series of letters or words, including "associate," "bachelor's," "master's," "doctor's" and their equivalents and foreign cognates, which signify, purport to signify, or are generally taken to signify satisfactory completion of the requirements of all or part of a program of study which is generally regarded and accepted as an academic degree-level program by accrediting agencies recognized by the Board.

(23) [~~(22)~~] Educational or Training Establishment--An enterprise offering a course of instruction, education, or training that is not represented as being applicable to a degree.

(24) [~~(23)~~] Exempt Institution--An institution that is accredited by an agency recognized by the Board under §7.6 of this chapter (relating to Recognition of Accrediting Agencies) or a career school or college that applies for and is declared exempt under this chapter, by the Texas Workforce Commission as described in Texas Education Code, §61.303(a) [~~§61.003(8)~~], or Texas Education Code Chapter 132, respectively. Exempt institutions may still have to comply with certain Board rules.

(25) Experiential Learning--Process through which students develop knowledge, skills, and values from direct experiences outside an institution's classrooms. Experiential learning encompasses a variety of activities including, but not limited to, internships, externships, practicums, clinicals, field experience, or other professional work experiences.

(26) [~~(24)~~] Fictitious Degree--A counterfeit or forged degree or a degree that has been revoked.

(27) [~~(25)~~] Fraudulent or Substandard Degree--A degree conferred by a person who, at the time the degree was conferred, was:

(A) operating in this state in violation of this subchapter;

(B) not eligible to receive a Certificate [~~certificate~~] of Authority [~~authority~~] under this subchapter and was operating in another state in violation of a law regulating the conferral of degrees in that state or in the state in which the degree recipient was residing or without accreditation by a recognized accrediting agency, if the degree is not approved through the review process described by §7.12 of this chapter (relating to Review and Use of Degrees from Institutions Not Eligible for Certificates of Authority); or

(C) not eligible to receive a Certificate [~~certificate~~] of Authority [~~authority~~] under this subchapter and was operating outside the United States, and whose degree the Board, through the review process described by §7.12 of this chapter, determines is not the equivalent of an accredited or authorized degree.

(28) Internship--This learning method encompasses all non-clinical site experiential learning.

(29) [~~(26)~~] Occasional Courses--Courses offered not more than twice at any given location in the state.

(30) [~~(27)~~] Out-of-State Public Postsecondary Institution--Any senior college, university, technical institute, junior or community college, or the equivalent which is controlled by a public body organized outside the boundaries of the State of Texas.

(31) ~~(28)~~] Person--Any individual, firm, partnership, association, corporation, enterprise, or other private entity or any combination thereof.

(32) ~~(29)~~] Physical Presence--

(A) While [~~while~~] in Texas a representative of the school or a person being paid by the school who conducts an activity related to postsecondary education, including for the purposes of recruiting students (excluding the occasional participation in a college/career fair involving multiple institutions or other event similarly limited in scope in the state of Texas), teaching or proctoring courses including internships, clinicals, externships, practicums, and other similarly constructed educational activities (excluding those individuals that are involved in teaching courses in which there is no physical contact with Texas students or in which visiting students are enrolled), or grants certificates or degrees; and/or

(B) The [~~the~~] institution has any location within the State [~~state~~] of Texas which would include any address, physical site, telephone number, or facsimile number within or originating from within the boundaries of the State [~~state~~] of Texas. Advertising to Texas students, whether through print, billboard, internet, radio, television, or other medium alone does not constitute a physical presence.

(33) [~~(30)~~] Postsecondary Educational Institution--An educational institution which:

(A) is not a public community college, public technical college, public senior college or university, medical or dental unit or other agency as defined in Texas Education Code §61.003;

(B) is incorporated under the laws of this state, or maintains a place of business in this state, or has an agent or representative present in this state, or solicits business in this state; and

(C) furnishes or offers to furnish courses of instruction in person, by electronic media, by correspondence, or by some means or all leading to a degree; provides or offers to provide credits alleged to be applicable to a degree; or represents that credits earned or granted are collegiate in nature, including describing them as "college-level," or at the level of any protected academic term.

(34) [~~(31)~~] Private Postsecondary Educational Institution--An institution which:

(A) is not an institution of higher education as defined by Texas Education Code §61.003;

(B) is incorporated under the laws of this state, maintains a place of business in this state, has an agent or [a] representative presence in this state, or solicits business in this state; and

(C) furnishes or offers to furnish courses of instruction in person, by electronic media, or by correspondence leading to a degree or providing credits alleged to be applied to a degree.

(35) [~~(32)~~] Program or Program of Study--Any course or grouping of courses which are represented as entitling a student to a degree or to credits applicable to a degree.

(36) [~~(33)~~] Protected Term--The terms "college," "university," "school of medicine," "medical school," "health science center," "school of law," "law school," or "law center," its abbreviation, foreign cognate or equivalents.

(37) Provisional Certificate of Authorization--A mechanism to provide 15 months of authority to operate in Texas under existing Board-recognized accreditor authority for another existing campus (either in-state or out-of-state) while working to have final approval of the new Texas campus by the Board-recognized accreditor. Failure to obtain Board-recognized accreditor approval within the 15-month time frame for the new Texas campus will result in termination of the Provisional Certificate of Authorization for the new campus which must then terminate operations until such time as the institution obtains a Certificate of Authority or a Certificate of Authorization through approval of a Board-recognized accreditor for the new campus. The Provisional Certificate of Authorization is valid for a period of 15 months from the date of issuance. The provisions under which the certificate was issued will be outlined in the Provisional Certificate of Authorization letter that accompanies the certificate. Additional Provisional Certificates of Authorization will not be issued.

(38) [~~(34)~~] Reciprocal State Exemption Agreement--An agreement entered into by the Board with an out-of-state state higher education agency or higher education system for the purpose of creating a reciprocal arrangement whereby that entity's institutions are exempted from the Board oversight for the purposes of distance education. In exchange, participating Texas public or private institutions of higher education as defined in Texas Education Code §61.003 would be exempted from that state's oversight for the purposes of distance education.

(39) [~~(35)~~] Recognized Accrediting Agency--Any accrediting agency the standards of accreditation or membership for which have been found by the Board to be sufficiently comprehensive and rigorous to qualify its institutional members for an exemption from the operation of this chapter.

(40) [~~(36)~~] Representative--A person who acts on behalf of an institution regulated under this subchapter. The term includes, without limitation, recruiters, agents, tutors, counselors, business agents, instructors, and any other instructional or support personnel.

(41) [~~(37)~~] Required State or National Licensure--The requirement for graduates of certain professional programs to obtain a license from state or national entities for entry-level practice.

(42) Single Point of Contact--An individual who is designated by an institution as the person responsible for receiving and conveying information between an institution and the Board or Board staff. The Board will direct all communications regarding an institution to the Single Point of Contact. Institutions must inform the Board of changes in the designated Single Point of Contact within 30 days of change.

(43) [~~(38)~~] Substantive Change--Any change in principal location, ownership, or governance of institution, change in accrediting agency or status with such accrediting agency, change in degree- or credential-level for an approved program, or addition of new programs, degrees or credentials offered.

(44) Visiting Student--A student pursuing a degree at an out-of-state institution (i.e., home institution) with no physical presence in Texas who has permission from the home institution and a Texas institution, which is either exempt from Board rules or currently in compliance with Board rules, to take specific courses at the Texas institution. The two institutions have an agreement that courses taken at the Texas institution will transfer back to the home institution.

§7.4. Standards for Operation of Institutions.

All institutions that operate within the State of Texas are expected to meet the following standards. These standards will be enforced through the Certificate [~~certificate~~] of Authority [~~authority~~] process or the Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~] process. Standards addressing the same principles will be enforced by recognized accrediting agencies under the Certificate of Authorization [~~authorization~~] process. Particular attention will be paid to the institution's commitment to education, responsiveness to recommendations and suggestions for improvement, and, in the case of a renewal of a Certificate [~~certificate~~] of Authority [~~authority~~], record of improvement and progress. These standards represent generally accepted administrative and academic practices and principles of accredited postsecondary institutions in Texas. Such practices and principles are generally set forth by institutional and specialized accrediting bodies and the academic and professional organizations.

(1) Legal Compliance. The institution shall be maintained and operated in compliance with all applicable ordinances and laws, including the rules and regulations adopted to administer those ordinances and laws. Career Schools and Colleges also shall demonstrate compliance with Texas Education Code, Chapter 132 by supplying a copy of a Certificate [~~certificate~~] of Approval [~~approval~~] to operate a career school or college or a Letter [~~letter~~] of Exemption [~~exemption~~] from the Texas Workforce Commission.

(2) Qualifications of Institutional Officers.

(A) The character, education, and experience in higher education of governing board administrators, supervisors, counselors, agents, representatives, and other institutional officers shall reasonably ensure that the institution can maintain the standards of the Board and progress to accreditation within the time limits set by the Board.

(B) (No change.)

(C) In the case of a renewal of a Certificate [~~certificate~~] of Authority [~~authority~~], the institutional officers also shall demonstrate a record of effective leadership in administering the institution.

(3) - (7) (No change.)

(8) Program [~~Institutional~~] Evaluation.

(A) - (C) (No change.)

(9) (No change.)

(10) Student Admission and Remediation.

(A) (No change.)

(B) Upon the admission of a student to any graduate program, the institution shall document that the student is prepared to undertake graduate-level work by obtaining proof that the student holds a baccalaureate degree from an institution accredited by a recognized accrediting agency, or an institution holding a Certificate [~~certificate~~]

of Authority [~~authority~~] to offer baccalaureate degrees under the provisions of this chapter, or a degree from a foreign institution equivalent to a baccalaureate degree from an accredited institution. The procedures used by the institution for establishing the equivalency of a foreign degree shall be consistent with the guidelines of the National Council on the Evaluation of Foreign Education Credentials or its successor.

(11) - (14) (No change.)

(15) General Education.

(A) - (B) (No change.)

(C) The applicant institution may arrange to have all or part of the general education component taught by another institution, provided that:

(i) - (ii) (No change.)

(iii) the providing institution shall be accredited by a recognized accrediting agency or hold a Certificate [~~certificate~~] of Authority [~~authority~~].

(16) - (24) (No change.)

§7.5. Administrative Penalties and Injunctions.

(a) A person or institution may not:

(1) Granting of Degrees--Grant, award, or offer to award a degree on behalf of a nonexempt institution unless the institution has been issued a Certificate [~~certificate~~] of Authority [~~authority~~], including an Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~], to grant the degree by the Board;

(2) Transferability of Credit--Represent that credits earned or granted by that person or institution are applicable for credit toward a degree to be granted by some other person or institution unless the institution is operating under a Certificate of Authority or Certificate of Authorization and has written agreement(s) with the institution which will accept the credit in transfer [~~except under conditions and in a manner specified under §7.7 of this chapter (relating to Institutions Accredited by Board Recognized Accreditors) and approved by the Board, or represent that credits earned or granted are collegiate in nature, including describing them as "college-level," or at the level of any protected academic term~~];

(3) Honorary Degrees--Award or offer to award an honorary degree on behalf of a private postsecondary institution subject to the provisions of this [~~the~~] subchapter, unless the institution has been awarded a Certificate [~~certificate~~] of Authority [~~authority~~] to award such a degree, or solicits another person to seek or accept an honorary degree and, further, unless the degree shall plainly state on its face that it is honorary;

(4) Protected Terms--Use a protected term in the official name or title of a nonexempt private postsecondary institution, an educational or training establishment, or describe an institution using any of these terms or a term having a similar meaning, except as authorized by the Board, or solicit another person to seek a degree or to earn a credit that is offered by an institution or training establishment that is using a term in violation of this section;

(5) Agent--Act as an agent who solicits students for enrollment in a private postsecondary institution subject to the provisions of this [~~the~~] subchapter without a Certificate [~~certificate~~] of Registration [~~registration~~], if required by this chapter;

(6) (No change.)

(b) - (j) (No change.)

(k) Specific Administrative Penalty--Any person or institution that is neither exempt nor the holder of a Certificate [~~certificate~~] of Authority [~~authority~~], including an Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~], to grant degrees, shall be assessed an administrative penalty of not less than $1,000 or more than $5,000 for, either individually or through an agent or representative:

(1) - (2) (No change.)

(3) representing that any credits offered are collegiate in nature subject to the provisions of this subchapter; and [~~or~~]

(4) with regard to assessment of such specific administrative penalties, each degree conferred without authority, and each person enrolled in a course or courses at the institution whose decision to enroll was influenced by the misrepresentations, constitutes a separate offense.

(l) (No change.)

(m) Specific Administrative Penalties for Agents--Any agent who solicits students for enrollment in an institution subject to the provisions of this [~~the~~] subchapter without a Certificate [~~certificate~~] of Registration [~~registration~~] shall be assessed an administrative penalty of not less than $500 or more than $1,000. Each student solicited without authority constitutes a separate offense.

(n) - (u) (No change.)

§7.6. Recognition of Accrediting Agencies.

(a) Eligibility Criteria--The [~~Texas Higher Education Coordinating~~] Board may recognize accrediting agencies with a commitment to academic quality and student achievement that demonstrate, through an application process, compliance with the following criteria:

(1) (No change.)

(2) Recognition--To receive and maintain recognition from the Board, the accrediting agency must, in addition to the items listed in paragraph (1) of this subsection:

(A) (No change.)

(B) Provide the Board with written evidence of continuing recognition by the Secretary of Education of the United States Department of Education. Loss of recognition from the Secretary automatically results in loss of Board recognition at the same time. Written evidence may consist of a letter from the chief executive officer of the accrediting agency. Accrediting agencies shall submit the evidence upon notice of continued recognition or upon a change in recognition status, scope or level [~~annually prior to the anniversary date of the initial Board recognition~~];

(C) - (F) (No change.)

(b) (No change.)

§7.7. Institutions Accredited by Board-Recognized Accreditors.

An institution which does not meet the definition of institution of higher education contained in Texas Education Code §61.003, is accredited by a Board-recognized accreditor, and is interested in offering degrees or courses leading to degrees in the State of Texas must follow the requirements in paragraphs (1) - (5) of this section.

(1) Authorization to Offer Degrees or Courses Leading to Degrees in Texas.

(A) Each institution and/or campus location must submit an application [~~a letter of intent~~] to offer degree(s) or courses leading to degrees in Texas. The application form for the Certificate of Authorization may be found on the Board's website. The application must contain [~~containing~~] the following information:

(i) (No change.)

(ii) Physical location of campus, or in the case of only providing clinicals or internships in Texas, the physical location of all clinical or internship sites, number of students in clinicals or internships and end date of clinicals or internships;

(iii) Name and contact information of the Chief Administrative Officer of the campus and name and contact information of the designated Single Point of Contact as defined in §7.3 of this chapter (relating to Definitions). In the case of an application based on clinicals or internships, name and contact information of clinical or internship site supervisors;

(iv) - (vii) (No change.)

(B) [~~Coordinating~~] Board staff will verify information and accreditation status and upon confirmation, will provide a Certificate of Authorization to offer in Texas those degrees or courses leading to degrees for which it is accredited, or in the case of only providing clinicals or internships in Texas, a Certificate of Authorization for an institution to offer in Texas identified clinicals or internships in connection with those degrees or courses leading to degrees for which the institution is accredited.

(C) Certificates of Authorizations based solely on providing clinicals or internships in Texas expire on the end date of the last Texas clinical or internship.

(i) If clinicals or internships are ongoing in Texas, the Certificate of Authorization based solely on providing clinicals or internships in Texas must be renewed on an annual basis. At least thirty (30) days, but no more than ninety (90) days, prior to the expiration of the current Certification of Authorization, an institution, if it desires renewal, is required to provide updated information regarding the physical location of all clinical or internship sites, number of students in clinicals or internships, and the end date of the clinicals or internships.

(ii) The Board shall renew the Certificate of Authorization based solely on providing clinicals or internships in Texas if it finds that the institution has maintained all requisite standards.

(2) An institution that has requested a Certificate of Authorization but has not received [~~final~~] authorization from its accrediting agency to be included in its main campus' accreditation either on an interim or final basis may be granted a Provisional [~~Conditional~~] Certificate of Authorization. The Provisional [~~Conditional~~] Certificate of Authorization is an acknowledgment that the institution has qualified for a temporary [~~an~~] exemption from Board rules based on the main campus' accreditation and is authorized to offer degrees and courses that lead to a degree. The Provisional [~~Conditional~~] Certificate of Authorization will be authorized until such time as the institution is granted accreditation or for a period of 15 months [~~one year~~], whichever occurs first. The conditions will be outlined in the Provisional [~~Conditional~~] Certificate of Authorization letter that will accompany the Provisional [~~Conditional~~] Certificate of Authorization. If accreditation has not been achieved by the expiration date, the Provisional [~~Conditional~~] Certificate of Authorization will be withdrawn, the institution's authorization to offer degrees will be terminated, and the institution will be required to comply with the provisions of §7.8 of this chapter (relating to Institutions Not Accredited by a Board-Recognized Accreditor). Subsequent Provisional Certificates of Authorization will not be issued.

(3) Grounds for Revocation of any Certificate of Authorization.

(A) (No change.)

(B) Institution loses accreditation from Board-recognized accreditor.

(C) Institution's Accreditor is removed from the U.S. Department of Education or the [~~Coordinating~~] Board's list of approved accreditors.

(D) - (E) (No change.)

(4) Process for Removal of Authorization.

(A) (No change.)

(B) Upon receipt of the notice of revocation, the institution must cease granting or awarding degrees or offering courses leading to degrees in Texas until it has either been granted a Certificate [~~certificate~~] of Authority [~~authority~~] or Alternative Certificate [~~alternate certificate~~] of Authority [~~authority~~] to grant degrees, or has received a determination that it did not lose its qualification for a Certificate [~~certificate~~] of Authorization [~~authorization~~].

(C) - (E) (No change.)

(5) Closure of an Institution.

(A) - (B) (No change.)

(C) If an institution closes or intends to close before all currently enrolled students have completed all requirements for graduation, the institution shall assure the continuity of students' education by entering into a teach-out agreement with another institution authorized by the Board to hold a Certificate of Authority, with an institution operating under a Certificate of Authorization, or with a public or private institution of higher education as defined in Texas Education Code §61.003 [~~two-year college, or with a public four-year university~~]. The agreement shall be in writing, shall be subject to Board approval, shall contain provisions for student transfer, and shall specify the conditions for completion of degree requirements at the teach-out institution. The agreement shall also contain provisions for awarding degrees.

(D) - (G) (No change.)

§7.8. Institutions Not Accredited by a Board-Recognized Accreditor. An institution which is not accredited by a Board-recognized [~~board recognized~~] accreditor and which does not meet the definition of institution of higher education contained in Texas Education Code, §61.003, must follow either the Certificate of Authority process or Alternative Certificate of Authority process in paragraphs (1) - (14) of this section in order to offer degrees or courses leading to degrees in the state of Texas. Institutions are encouraged to contact the [~~Coordinating~~] Board staff before filing a formal application.

(1) Certificate of Authority.

(A) Eligibility--The Board will accept applications for a Certificate [~~certificate~~] of Authority [~~authority~~] only from those institutions:

(i) (No change.)

(ii) which meet one of the following conditions:

(I) has [~~Has~~] been legally operating, enrolling students, and conducting classes in Texas and has complied with state law as a non-degree-granting institution for a minimum of two (2) years;

(II) has [~~Has~~] been legally operating, enrolling students, and conducting classes in Texas and has complied with state law as a degree-granting institution and wishes to open a new campus; [~~or~~]

(III) has [~~Has~~] been legally operating as a degree-granting institution in another state for a minimum of four (4) years and can verify compliance with all applicable laws and rules in that state; or

(IV) held [~~Held~~] an Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~] for one year.

(B) To be considered by the Board as [~~to be~~] operating, means to have assembled a governing board, developed policies, materials, and resources sufficient to satisfy the requirements for a Certificate [~~certificate~~] of Authority [~~authority~~], and either have enrolled students and conducted classes or accumulated sufficient financing to do so for at least one year upon certification based on reasonable estimates of projected enrollment and costs. Sufficient financing may be demonstrated by proof of an adequate surety bond, assignment of account, certificate of deposit, irrevocable letter of credit, or a properly executed participation contract with a private association, partnership, corporation, or other entity whose membership is comprised of post-secondary institutions, which is:

(i) (No change.)

(ii) Conditioned to provide indemnification to any student or enrollee of the school or his/her parent or guardian determined by the Board to have suffered loss of prepaid tuition or any fees as a result of violation of any minimum standard or as a result of a holder of a Certificate [~~certificate~~] of Authority [~~authority~~] ceasing operation, and provides evidence satisfactory to the Board of its financial ability to provide such indemnification and lists the amount of surety liability the guaranteeing entity will assume.

(2) Application for Certificate of Authority.

(A) (No change.)

(B) The application form for the Certificate [~~certificate~~] of Authority [~~authority~~] may be found on the [~~Coordinating~~] Board's website.

(C) - (D) (No change.)

(E) Name and contact information of the designated Single Point of Contact as defined in §7.3 of this chapter (relating to Definitions).

(3) Authorization Process.

(A) An institution must submit an application to the [~~Coordinating~~] Board to be considered for a Certificate of Authority to offer specific degree(s), and courses which may be applicable toward a degree, in Texas.

(B) Each institution must have either a Letter [~~letter~~] of Exemption [~~exemption~~] or Certificate of Approval from the Texas Workforce Commission pursuant to Texas Education Code, Chapter 132.

(C) (No change.)

(D) Institutions accredited by entities which are not recognized by the Board [~~board~~] must submit all accrediting agency reports and any findings and institutional responses to such reports and findings.

(E) - (G) (No change.)

(H) An institution must be fully operational as of the date of the on-site evaluation; i.e., it must have in-hand or under contract all the human, physical, administrative, and financial resources necessary to demonstrate its capability to meet the standards for nonexempt institutions. The conditions found at the institution as of the date of the on-site evaluation visit will provide the basis for the visiting team's evaluation and report, the Certification Advisory Council's [~~certification advisory council's~~] recommendation, the Commissioner's recommendation, and the Board's determination of the institution's qualifications for a Certificate [~~certificate~~] of Authority [~~authority~~].

(I) - (K) (No change.)

(L) Upon receipt of the Council's recommendation, the Commissioner shall make his/her recommendation regarding the application to the [~~Coordinating~~] Board.

(M) After review of the Commissioner's and Council's recommendations, if the [~~Coordinating~~] Board approves the application, the Commissioner shall immediately have prepared a Certificate of Authority containing the issue date, a list of the approved degree(s) or courses leading to degrees, and the period for which the Certificate is valid.

(N) After review of the Commissioner's and Council's recommendations, if the [~~Coordinating~~] Board does not approve the application, the Commissioner shall immediately notify the institution of the denial and the reasons for the denial.

(O) (No change.)

(4) Terms and Limitations of a Certificate of Authority.

(A) The Certificate [~~certificate~~] of Authority [~~authority~~] to grant degrees is valid for a period of two (2) years from the date of issuance.

(B) Certification by the State of Texas is not accreditation, but merely a protection of the public interest while the institution pursues accreditation from a recognized agency, within the time limitations expressed in subparagraph (C) of this paragraph [~~section~~]. Therefore, the institution awarded a Certificate [~~certificate~~] of Authority [~~authority~~] shall not use terms to interpret the significance of the certificate which specify, imply, or connote greater approval than simple permission to operate and grant certain specified degrees in Texas. Terms which may not be used include, but are not limited to, "accredited," "supervised," "endorsed," and "recommended" by the State of Texas or agency thereof. Specific language prescribed by the Commissioner which explains the significance of the Certificate [~~certificate~~] of Authority [~~authority~~] shall be included in all publications, advertisements, and other documents where certification and the accreditation status of the institution are mentioned.

(C) An institution may be granted consecutive Certificates [~~certificates~~] of Authority [~~authority~~] for no longer than eight (8) years. Absent sufficient cause, at the end of the eight (8) years, the institution must be accredited by a Board-recognized [~~board recognized~~] accrediting agency.

(5) - (6) (No change.)

(7) Revocation of Certificate of Authority to Offer Degrees in Texas.

(A) - (D) (No change.)

(E) Until the Certificate [~~certificate~~] of Authority [~~authority~~] is reinstated, the institution may not grant degrees, offer courses leading to degrees, or receive payments from students for courses which may be applicable toward a degree.

(8) Reapplication After Revocation of Certificate of Authority.

(A) - (B) (No change.)

(C) The period of time during which the institution does not hold a Certificate [~~certificate~~] of Authority [~~authority~~] shall not be counted against the eight (8) year period within which the institution must achieve accreditation from a recognized accrediting agency ab-

sent sufficient cause, as described in paragraph (4)(C) of this section; the time period begins to run again upon reinstatement.

(9) Fees Related to Certificates of Authority.

(A) Certificates of Authority. Each biennium the Commissioner shall set the fee for initial and renewal applications for Certificates [~~certificates~~] of Authority [~~authority~~], which shall be equal to the average cost of evaluating the applications. The fee shall include the costs of travel, meals, and lodging of the visiting team and the Commissioner, or the Commissioner's designated representatives, and consulting fees for the visiting team members, if an on-site review is conducted.

(B) Each biennium, the Commissioner shall also set the fees for amendments to Certificates [~~certificates~~] of Authority [~~authority and certificates of registration of agents~~].

(C) (No change.)

(10) Renewal of Certificate of Authority.

(A) At least one hundred eighty (180) days, but no more than two hundred ten (210) days, prior to the expiration of the current Certificate [~~certificate~~] of Authority [~~authority~~], an institution, if it desires renewal, shall make application to the Board on forms provided upon request. Reports not previously submitted to the Board, related to the application for or renewal of accreditation by national or regional accrediting agencies shall be included. The renewal application shall be accompanied by the fee described in paragraph (9) of this section.

(B) The application for renewal of the Certificate [~~certificate~~] of Authority [~~authority~~] will be evaluated in the same manner as that prescribed for evaluation of an initial application, except that the evaluation will include the institution's record of improvement and progress toward accreditation.

(C) An institution may be granted consecutive Certificates [~~certificates~~] of Authority [~~authority~~] for no longer than eight (8) years. Absent sufficient cause, at the end of the eight (8) years, the institution must be accredited by a recognized accrediting agency.

(D) (No change.)

(11) (No change.)

(12) Authority to Represent Transferability of Course Credit. Any institution as defined in §7.3 of this chapter [~~(relating to Definitions)~~], whether it offers degrees or not, may solicit students for and enroll them in courses on the basis that such courses will be credited to a degree program offered by another institution, provided that:

(A) the other institution is named in such representation, and is accredited by a recognized accrediting agency or has a Certificate [~~certificate~~] of Authority [~~authority~~];

(B) (No change.)

(C) the written agreement between the institution subject to these rules and the accredited institution is approved by both institutions' governing boards [~~of trustees~~] in writing, and is filed with the Board.

(13) Closure of an Institution.

(A) - (B) (No change.)

(C) If an institution closes or intends to close before all currently enrolled students have completed all requirements for graduation, the institution shall assure the continuity of students' education by entering into a teach-out agreement with another institution authorized by the Board to hold a Certificate of Authority, with an institution operating under a Certificate of Authorization, or with a public or private institution of higher education as defined in Texas Education Code §61.003 [~~two-year college~~]. The agreement shall be in writing, shall be subject to Board approval, shall contain provisions for student transfer, and shall specify the conditions for completion of degree requirements at the teach-out institution. The agreement shall also contain provisions for awarding degrees.

(D) (No change.)

(14) Alternative Certificate of Authority. In lieu of the standard Certificate [~~certificate~~] of Authority [~~authority~~] requirements for institutions and their agents described in paragraphs (1) - (13) of this section, an institution may obtain an Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~] to issue degrees as provided by this subsection. Alternative Certificates [~~certificates~~] of Authority [~~authority~~] shall be issued by the Commissioner and are temporary, being valid for twelve (12) months, after which a regular Certificate [~~certificate~~] of Authority [~~authority~~] shall be required. A site visit shall be conducted by Board staff during the initial twelve (12) month period.

(A) Surety Instrument Requirement. At the time application is made for an Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~], or when new programs, stand-alone courses or continuing education courses are added, the applicant shall file with the Board a surety bond or surety alternative which meets the requirements set forth in these sections. Schools located in Texas each shall file one bond or surety alternative covering the school and its agents.

(i) The amount of the bond or other allowable surety instrument submitted to the Board with an application for an Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~] shall be equal to or greater than the cost of providing a refund, including administrative costs associated with processing claims, for the maximum prepaid, unearned tuition and fees of the school for a period or term during the applicable school year for which programs of instruction are offered, including, but not limited to, on a semester, quarter, monthly, or class basis; except that the period or term of greatest duration and expense shall be utilized for this computation where a school's year consists of one or more such periods or terms.

(ii) A school, whose surety value is found by the Board to be insufficient to fund the unearned, prepaid tuition of enrolled students, shall be noncompliant with these sections, and, if, after ten (10) working days from the issuance of a notice of noncompliance, the school has not increased its surety to an acceptable level, it shall be subject to revocation or suspension of its Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~].

(iii) - (vii) (No change.)

(viii) In lieu of a surety bond, an applicant may file with the Board an irrevocable letter of credit that:

(I) (No change.)

(II) Is conditioned [~~Conditioned~~] to provide indemnification to any student or enrollee of the school or his/her parent or guardian determined by the Board to have suffered loss of tuition or any fees as a result of violation of any minimum standard or as a result of a holder of an Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~] ceasing operation.

(ix) In lieu of a surety bond, an applicant may file with the Board a properly executed participation contract with a private association, partnership, corporation or other entity whose membership is comprised of postsecondary institutions, which:

(I) (No change.)

(II) Is conditioned [~~Conditioned~~] to provide indemnification to any student or enrollee of the school or his/her parent or guardian determined by the Board to have suffered loss of prepaid tuition or any fees as a result of violation of any minimum standard or as a result of a holder of an Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~] ceasing operation, and provides evidence satisfactory to the Board of its financial ability to provide such indemnification and lists the amount of surety liability the alternative entity will assume.

(x) - (xi) (No change.)

(xii) A school applying for an Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~] shall be exempt from the surety instrument requirement if it can demonstrate a United States Department of Education composite financial responsibility score of 1.5 or greater on its current financial statement; or if it can demonstrate a composite score between 1.1 and 1.4 on its current financial statement and has scored at least 1.5 on a financial statement in either of the prior two (2) years.

(B) Application and Statement. Institutions seeking an Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~] are urged to obtain informal guidance from Board staff before filing a formal application. The Board will accept applications for an Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~] only from those institutions proposing to offer a degree or credit courses alleged to be applicable to a degree.

(C) An institution seeking an Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~] shall submit to the Board a completed application, which must demonstrate it meets, or has the ability to meet, depending on circumstances, the standards set out in §7.4 of this chapter; a signed and dated affirmation statement, acknowledging compliance with certification criteria set forth in this section; and a notarized attestation statement signed by the chief executive officer or equivalent. The application form shall contain:

(i) - (vii) (No change.)

(D) (No change.)

(E) Applications must be submitted with an original and four copies and accompanied by the required fee. Alternative Certificate [~~certificate~~] of Authority [~~authority~~] fees shall be five hundred dollars ($500) more than the fee for a regular Certificate [~~certificate~~] of Authority [~~authority~~], as established in paragraph (9) of this section.

(F) Board's Review of Applications.

(i) (No change.)

(ii) Within one hundred twenty (120) days of receipt of a complete application, the Commissioner shall either award a one-year Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~] or deny the application.

(iii) (No change.)

(iv) Upon denial, the institution may not reapply for a period of one hundred eighty (180) days.

(G) Terms and Limitations of an Alternative Certificate of Authority.

(i) The Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~] to grant degrees is valid for one (1) year from the date of issuance.

(ii) (No change.)

(iii) Certification by the State of Texas is not accreditation, but merely a protection of the public interest while the institution pursues accreditation from a recognized agency, within the time limitations expressed in paragraph (10)(C) of this section. An institution awarded an Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~] shall not use terms to interpret the significance of the certificate which specify, imply, or connote greater approval than simple permission to operate and grant degrees in Texas. Terms which may not be used include, but are not limited to, "accredited," "supervised," "endorsed," and "recommended" by the State of Texas or agency thereof. Specific language prescribed by the Commissioner which explains the significance of the Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~] shall be included in all publications, advertisements, and other documents where certification and the accreditation status of the institution are usually mentioned, including the institution's catalog and the home page of the institution's Internet website.

(iv) Approval of the application grants the institution the authority to award degrees or to enroll students for courses that may be applicable toward a degree only for those programs approved by the Alternative Certificate of Authority. Separate program approval shall be required for each additional [~~associate~~] degree program in accordance with this chapter.

(v) The Commissioner may revoke an institution's Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~] to grant degrees at any time if the Commissioner finds that:

(I) - (V) (No change.)

(H) Continuing Operations after One Year.

(i) At least one hundred eighty (180) days, but no more than two hundred ten (210) days, prior to the expiration of the current Alternative Certificate [~~alternative certificate~~] of Authority [~~authority~~], an institution, if it desires to continue operations, shall make application to the Board for a Certificate of Authority following the process in paragraph (10) of this section. Only one Alternative Certificate of Authority will be granted.

(ii) (No change.)

§7.10. Registration of Agents.

(a) Application for Registration--An agent as defined in §7.3[~~(4)~~] of this chapter (relating to Definitions) shall submit an application to the [~~Texas Higher Education Coordinating~~] Board in the following manner:

(1) The application shall be accompanied by the fee described in this subsection [~~§7.8(9) of this chapter (relating to Institutions Not Accredited by a Board Recognized Accreditor)~~].

(A) Each biennium, the Commissioner shall set the fee for Certificates of Registration of agents.

(B) The Commissioner shall report changes in the fee to the Board at a quarterly meeting.

(2) (No change.)

(3) The agent's Certificate [~~certificate~~] of Registration [~~registration~~] shall be issued for a five-year period.

(4) If the Commissioner denies the application for a Certificate [~~certificate~~] of Registration [~~registration~~], or a renewal of the Certificate [~~certificate~~] of Registration [~~registration~~], the applicant shall be notified in writing, and shall be given the reasons for the denial. Additionally, the Commissioner shall notify the institution

or institutions which the agent represented or proposed to represent, according to the records of the Board, in the same manner.

(5) - (6) (No change.)

(b) Revocation of Registration--The Commissioner may revoke an agent's Certificate [~~certificate~~] of Registration [~~registration~~] at any time if the Commissioner finds that:

(1) (No change.)

(2) The institution represented has had its Certificate [~~certificate~~] of Authority [~~authority~~] revoked;

(3) - (4) (No change.)

(c) - (d) (No change.)

§7.11. Changes of Ownership and Other Substantive Changes.

(a) Change of Ownership or Control for Career Schools and Colleges. In the event of a change in ownership or control of a career school or college, the Certificate [~~certificate~~] of Authority or Certificate of Authorization [~~authority~~] is automatically withdrawn unless the institution meets the requirements of this section.

(b) The Commissioner may authorize the institution to retain the Certificate [~~certificate~~] of Authority or Certificate of Authorization [~~authority~~] during and after a change of ownership or control, provided that the institution notifies Board staff of the impending transfer in time for staff to receive, review, and approve the documents listed in paragraphs (1) - (3) of this subsection and provided that the following conditions are met:

(1) - (3) (No change.)

(c) If the institution does not meet the conditions outlined under this section prior to completion of transfer of ownership or control and the institution loses its Certificate or Certificate of Authorization [~~certificate~~] of Authority [~~authority~~], the new owner(s) shall submit a new application for a Certificate [~~certificate~~] of Authority [~~authority~~] as outlined under §7.8 of this chapter (relating to Institutions Not Accredited by a Board-Recognized Accreditor) or a new application for a Certificate of Authorization as outlined under §7.7 of this chapter (relating to Institutions Accredited by Board-Recognized Accreditors).

(d) Any modification of an approved degree program that results from a change of ownership or control constitutes a program revision. Requests for approval of program revisions or other substantive changes as defined in §7.3 of this chapter (relating to Definitions) shall conform to the procedures and requirements contained in §7.7(1) and §7.8(11) of this chapter.

(e) If the ownership or control of a career school or college is transferred within, among, or between different subsidiaries, branches, divisions, or other components of a corporation and if said transfer in no way diminishes the career school or college's administrative capability or educational program quality, the Commissioner may permit the school to retain its Certificate [~~certificate~~] of Authority or Certificate of Authorization [~~authority~~] during the transfer period. In such cases, the career school or college shall fully comply with all provisions outlined in this section.

(f) All notifications regarding changes of ownership or other substantive changes should be provided to the Board via the institution's designated Single Point of Contact.

§7.12. Review and Use of Degrees from Institutions Not Eligible for Certificates of Authority.

(a) A person holding a degree from an institution that is not eligible to receive a Certificate [~~certificate~~] of Authority [~~authority~~] may request a letter from the Board confirming that the institution is not eligible for a Certificate [~~certificate~~] of Authority [~~authority~~] and providing the procedures for review and approval of the degree for use in Texas. The Board shall send a copy of the letter to the institution.

(b) Procedures for Review and Approval.

(1) An institution that confers a fraudulent or substandard degree described in §7.3[~~(24)(B) or (C)~~] of this chapter (relating to Definitions), may request that the Board review and approve for use in Texas that degree, as provided in those sections. The person or institution shall submit the request on a form created by the Board.

(2) The Commissioner shall apply the standards provided in §7.4 of this chapter (relating to Standards for Operation of Institutions) and §7.5(a)(6) [~~§7.5~~] of this chapter (relating to Administrative Penalties and Injunctions) to determine if the degrees awarded by a person or institution are equivalent to degrees granted by a private postsecondary educational institution or other person holding a Certificate [~~certificate~~] of Authority [~~authority~~] from the Board.

(3) The Commissioner, or the Commissioner's designated representatives, and an ad hoc team of independent consultants, if the Commissioner finds that such a team would provide a benefit to the Board or to the institution, may either [~~shall~~] visit the institution and conduct an on-site survey or conduct a desk review to evaluate the application for review and approval. The ad hoc [~~visiting~~] team shall be composed of people who have experience on the faculties or staffs of accredited institutions and who possess knowledge of accreditation standards.

(4) The Board may [~~shall~~] charge the person or institution petitioning for review and approval a fee equal to the application fee for a Certificate [~~certificate~~] of Authority [~~authority~~] or the actual cost of conducting the review, including travel expenses and cost of consultant fees[~~, whichever is greater~~].

§7.14. Distance Education Approval Processes for Degree Granting Colleges and Universities Other Than Texas Public Institutions.

An institution which does not meet the definition of institution of higher education contained in Texas Education Code §61.003 and wishes to offer distance education to students in Texas must follow the requirements in paragraph (1) or [~~paragraphs (1) and~~] (2) of this section. For the purposes of this section distance education shall mean education or training delivered off campus via educational technologies where the student(s) and the instructor(s) are separated by physical distance and/or time.

(1) Exempt Institutions.

(A) An institution is exempt and does not need to receive permission from the Board to offer distance education programs and courses to Texas students if it fulfills the following:

(i) Accredited to offer degrees at a specific level either by an accrediting agency recognized by the Board or an accrediting agency recognized by the Secretary of Education of the U.S. Department of Education or approved by a Texas state agency which authorizes the school's graduates to take a professional or career and technical state licensing examination administered by that agency; and

(ii) (No change.)

(B) - (C) (No change.)

(D) An institution's exemption under subparagraph (A) or (B) of this paragraph continues as long as it is in compliance with subparagraph (A) or (B) of this paragraph. Exempt institutions must also maintain compliance with subparagraph (C) of this paragraph. If an institution is no longer accredited by an accrediting

agency [~~accreditor~~] recognized by the Board or an accrediting agency recognized by the Secretary of Education of the U.S. Department of Education or no longer approved by a Texas state agency which authorizes the school's graduates to take a professional or career and technical state licensing examination administered by that agency [~~Texas~~] and/or maintains a physical presence in Texas or if an institution is no longer covered by a reciprocal state exemption agreement, the institution is no longer eligible for an exemption and must receive Board authority to offer distance education to Texas students. The institution would need to either submit an application for a Certificate of Authority as outlined under §7.8 of this chapter (relating to Institutions Not Accredited by a Board-Recognized Accreditor) or for a Certificate of Authorization as outlined under §7.7 of this chapter (relating to Institutions Accredited by Board-Recognized Accreditors).

(2) Nonexempt Institutions.

(A) An institution is not exempt and must receive Board permission to offer distance education programs and courses to Texas students if it fulfills any of the following:

(i) Is accredited to offer degrees at a specific level by an accrediting agency recognized by the Board or approved by a Texas state agency which authorizes the school's graduates to take a professional or career technical state licensing examination administered by that agency and maintains a physical presence in Texas as defined by §7.3 of this chapter; the institution would need to submit an application for a Certificate of Authorization as outlined under §7.7 of this chapter; or

(ii) Is not accredited to offer degrees at a specific level by an accrediting agency recognized by the Board or an accrediting agency recognized by the Secretary of Education of the U.S. Department of Education nor approved by a Texas state agency which authorizes the school's graduates to take a professional or career technical state licensing examination administered by that agency. The institution, whether or not it maintains a physical presence in Texas as defined by §7.3 of this chapter, would need to submit an application for a Certificate of Authority as outlined under §7.8 of this chapter.

[~~(B) An institution that is accredited to offer degrees at a specific level by an accrediting agency recognized by the Board or approved by a Texas state agency which authorizes the school's graduates to take a professional or career technical state licensing examination by that agency and maintains a physical presence in Texas as defined by §7.3 of this chapter must follow the guidelines established in §7.7 of this chapter (relating to Institutions Accredited by Board Recognized Accreditors).~~]

[~~(C) An institution that is not accredited to offer degrees at a specific level by an accrediting agency recognized by the Board nor approved by a Texas state agency which authorizes the school's graduates to take a professional or career technical state licensing examination administered by that agency, whether or not it maintains a physical presence in Texas as defined by §7.3 of this chapter must follow the guidelines established in §7.8 of this chapter (relating to Institutions Not Accredited by a Board Recognized Accreditor).~~]

(B) [~~(D)~~] An institution that would like to offer a degree program or courses leading to a degree in a religious discipline via distance education is exempt from seeking Board approval. A religious institution that would like to offer a degree program or courses leading to a degree in a non-religious discipline via distance education must follow the requirements outlined in subparagraph (A)(i) and (ii) [~~(B) or (C)~~] of this paragraph.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205355
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: January 24, 2013
For further information, please call: (512) 427-6114

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CHAPTER 9. PROGRAM DEVELOPMENT IN PUBLIC TWO-YEAR COLLEGES
SUBCHAPTER E. CERTIFICATE AND ASSOCIATE DEGREE PROGRAMS
19 TAC §9.93

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to §9.93, concerning Presentation of Requests and Steps for Implementation of New Degree and Certificate Programs in Career Technical/Workforce Education. Specifically, this amendment will specify that an institution may not receive approval for a new associate of applied science degree program that the institution previously offered which was closed during the last ten years due to low productivity.

Dr. MacGregor M. Stephenson, Assistant Commissioner for Workforce, Academic Affairs and Research, has determined that for each year of the first five years the amendments are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the section.

Dr. Stephenson has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be to ensure that institutions allocate resources into programs that regularly produce graduates. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted by mail to Dr. MacGregor M. Stephenson, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711; or via email to WAARcomments@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, Chapter 61, which gives the Coordinating Board the authority to regulate the awarding or offering of degrees, credit towards degrees, and the use of certain terms.

The proposed amendments affect Texas Education Code, Chapter 61, Subchapter C, §61.051(f).

§9.93. Presentation of Requests and Steps for Implementation of New Degree and Certificate Programs in Career Technical/Workforce Education.

(a) Requests for new associate degree and certificate programs shall be made in accordance with the procedures stipulated in subsection (b)(1)(A) - (P) [~~(O)~~] of this section.

(b) Approval of new associate degree and certificate programs is automatic if all of the following conditions are met.

(1) The institution shall certify that:

(A) - (L) (No change.)

(M) A new associate degree program is not being requested in a discipline in which the institution previously offered an associate degree and which was closed due to low productivity in the last 10 years;

(N) [~~(M)~~] The institution has an improvement plan in place for all career technical/workforce programs that do not currently meet Board standards for both graduation and placement;

(O) [~~(N)~~] The appropriate Higher Education Regional Council has been notified in writing of the proposal for a new program; and

(P) [~~(O)~~] Skill standards recognized by the Texas Skill Standards Board, if they exist for the discipline, have been reviewed and considered for inclusion in the curriculum for the program.

(2) If a proposed two-year career technical/workforce education program or a certificate program meets the conditions stipulated in subsection (b)(1)(A) - (P) [~~(O)~~] of this section, the institution shall submit a request to the Assistant Commissioner for Academic Affairs and Research to add the program. If a proposed program does not meet the conditions stipulated in subsection (b)(1)(A) - (P) [~~(O)~~] of this section, the institution must submit a proposal using the standard degree request form.

(A) The Coordinating Board shall post the proposed program online for public comment for a period of 30 days. If no objections are received, the Coordinating Board staff shall update the institution's program inventory accordingly.

(B) If objections to the proposed program are received by the Coordinating Board staff, the proposed program shall not be implemented until all objections are resolved. The Coordinating Board reserves the right to audit a certificate or degree program at any time to ensure compliance with any of the criteria contained in subsection (b)(1)(A) -(P) [~~(O)~~] of this section.

(c) - (e) (No change.)

(f) Revision of an existing associate degree or certificate program is automatically approved if all of the requirements in subsection (b)(1)(A) - (P) [~~(O)~~] of this section are met.

(g) To request a change of CIP code for an existing degree or certificate program, the institution shall notify the Coordinating Board staff and certify that the revised program meets the requirements in subsection (b)(1)(A) - (P) [~~(O)~~] of this section.

(h) If the revision of an existing degree or certificate program meets the conditions stipulated in subsection (b)(1)(A) - (P) [~~(O)~~] of this section the institution shall submit a request to the Assistant Commissioner for Academic Affairs and Research to revise the program. The Coordinating Board staff shall update the institution's program inventory accordingly.

(i) If a program revision does not meet the conditions stipulated in subsection (b)(1)(A) - (P) [~~(O)~~] of this section, the institution shall submit a revision request using the standard revision request form.

(j) The Coordinating Board reserves the right to audit a certificate or degree program at any time to ensure compliance with any of the requirements in subsection (b)(1)(A) - (P) [~~(O)~~] of this section.

(k) - (m) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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CHAPTER 22. GRANT AND SCHOLARSHIP PROGRAMS

SUBCHAPTER L. TOWARD EXCELLENCE, ACCESS, AND SUCCESS (TEXAS) GRANT PROGRAM

19 TAC §§22.226, 22.228, 22.231, 22.234, 22.236

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to §§22.226, 22.228, 22.231, 22.234, and 22.236, concerning Toward EXcellence, Access, and Success (TEXAS) Grant Program.

Specifically, changes to §22.226 add definitions for "general academic teaching institution" and "priority model" (terms that are relevant to the TEXAS Grant priority model, adopted by the 82nd Legislature with the passage of Senate Bill 28, which goes into effect with recipients selected in spring 2013 for fall awards); and "honorably discharged" (a term relevant to new language in Senate Bill 28 that authorizes certain Texas veterans to qualify for TEXAS Grant initial year awards, effective fall 2013). A definition for "committee" is added for referencing the TEXAS Grant Oversight Committee, which is mentioned in new §22.242, and is simultaneously proposed for adoption in this issue of the *Texas Register.*

Changes to §22.228(a) indicate the language in this subsection applies to persons who receive initial TEXAS Grant awards prior to fall 2013, and to persons who receive such awards while enrolling in public community colleges, technical colleges, or the Lamar Institute of Technology in fall 2013 or later.

Changes to §22.228(a)(6)(B) clarify the eligibility of persons on track to graduate high school while meeting program requirements at the time their eligibility for the award was determined, but who then failed to complete those requirements.

New §22.228(a)(6)(D) adds wording regarding eligibility for persons who were on track to acquire an associate's degree but then failed to do so (a new provision from Senate Bill 28, mentioned earlier).

New §22.228(b) reflects the new provisions of the TEXAS Grant priority model, adopted with the aforementioned Senate Bill 28. These provisions apply to persons who graduate high school on

or after May 1, 2013 and enroll in general academic teaching institutions. The provisions indicate priority in selecting recipients is to be given to persons who meet any two of four additional academic preparation requirements. New language also authorizes certain Texas veterans to qualify to compete for initial year TEXAS Grant awards.

Changes to §22.228(c)(8) extend the conditions for continuation awards for persons whose first awards were based on being on track to meet program requirements to include persons on track to acquire associate's degrees.

New §22.228(d) provides that the Board shall give priority to awarding TEXAS grants to those students whose expected family contribution does not exceed 60 percent of the statewide average tuition and fees for general academic teaching institutions (a new provision from Senate Bill 28, mentioned earlier).

Changes to §22.231(a) clarify that persons enrolled for fewer than 6 semester credit hours cannot receive TEXAS Grant awards.

Changes to §22.234(b)(7) confirm that persons enrolled for fewer than 6 hours, even under hardship conditions, cannot receive grants.

Amendments to §22.234(e) adjust the award prorations to properly reflect award amounts for various levels of enrollment.

Changes to §22.236(a)(1) indicate allocations of funds for initial year awards are not to be impacted by an institution's number of awards made on the basis of the priority model (a new provision from Senate Bill 28, mentioned earlier).

Dan Weaver, Assistant Commissioner for Business and Support Services, has determined that for each year of the first five years the amendments are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the sections.

Mr. Weaver has also determined that each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the changes will be that TEXAS Grant awards will be more effectively targeted to financially needy students who are well prepared to be successful in college. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Dan Weaver, P.O. Box 12788, Austin, Texas 78711; (512) 427-6165; Dan.Weaver@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under Texas Education Code, §56.303, which provides the Coordinating Board with the authority to adopt rules to implement the TEXAS Grant Program.

The amendments affect Texas Education Code, §§56.301 - 56.311.

§22.226. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) - (3) (No change.)

(4) Committee--The TEXAS Grant Oversight Committee, authorized through Texas Education Code, §56.311.

(5) [~~(4)~~] Cost of attendance--A Board-approved estimate of the expenses incurred by a typical financial aid student in attending a particular college. It includes direct educational costs (tuition, fees, books, and supplies) as well as indirect costs (room and board, transportation, and personal expenses).

(6) [~~(5)~~] Degree or certificate program of four years or less--A baccalaureate degree or certificate program other than in architecture, engineering or any other program determined by the Board [~~board~~] to require four years or less to complete.

(7) [~~(6)~~] Degree or certificate program of more than four years--A baccalaureate degree or certificate program in architecture, engineering or any other program determined by the Board [~~board~~] to require more than four years to complete.

(8) [~~(7)~~] Enrolled on at least a three-quarter basis--Enrolled for the equivalent of nine semester credit hours in a regular semester.

(9) [~~(8)~~] Entering undergraduate--A student enrolled in the first 30 semester credit hours or their equivalent, excluding hours taken during dual enrollment in high school and courses for which the student received credit through examination.

(10) [~~(9)~~] Expected family contribution--The amount of discretionary income that should be available to a student from his or her resources and that of his or her family, as determined following the federal methodology.

(11) [~~(10)~~] Financial need--The cost of attendance at a particular public or private institution of higher education less the expected family contribution. The cost of attendance and family contribution are to be determined in accordance with Board guidelines. Federal and state veterans' educational and special combat pay benefits are not to be considered in determining a student's financial need.

(12) General Academic Teaching Institution--As the term is defined in Texas Education Code, §61.003.

(13) Honorably discharged--Released from active duty military service with an Honorable Discharge, General Discharge under Honorable Conditions, or Honorable Separation or Release from Active Duty, as documented by the Certificate of Release or Discharge from Active Duty (DD214) issued by the Department of Defense.

(14) [~~(11)~~] Initial year award--The grant award made in the student's first year in the TEXAS Grant program, typically made up of a fall and spring disbursement.

(15) [~~(12)~~] Institution of Higher Education or Institution--Any public technical institute, public junior college, public senior college or university, medical or dental unit or other agency of higher education as defined in Texas Education Code, §61.003(8).

(16) [~~(13)~~] Period of enrollment--The term or terms within the current state fiscal year (September 1 - August 31) for which the student was enrolled in an approved institution and met all the eligibility requirements for an award through this program.

(17) [~~(14)~~] Private or Independent Institution of Higher Education--Any college or university defined as a private or independent institution of higher education by Texas Education Code, §61.003(15).

(18) Priority Model--The academic requirements for persons who graduate from high school on or after May 1, 2013 and attend a general academic teaching institution in fall 2013 or later, given in §22.228(b)(5) of this title (relating to Eligible Students).

(19) [~~(15)~~] Program Officer--The individual named by each participating institution's chief executive officer to serve as agent for the Board. The Program Officer has primary responsibility for all

ministerial acts required by the program, including maintenance of all records and preparation and submission of reports reflecting program transactions. Unless otherwise indicated by the administration, the director of student financial aid shall serve as Program Officer.

(20) [~~(16)~~] Recommended or advanced high school programs--The curriculum specified in the Texas Education Code, §28.025, and the rules promulgated there under by the State Board of Education.

(21) [~~(17)~~] Required fees--A mandatory fee (required by statute) or discretionary fee (authorized by statute, imposed by the governing board of an institution) that an institution charges to a student as a condition of enrollment at the institution or in a specific course.

(22) [~~(18)~~] Resident of Texas--A resident of the State of Texas as determined in accordance with Chapter 21, Subchapter B of this title (relating to Determination of Resident Status). Nonresident students who are eligible to pay resident tuition rates are not residents of Texas.

(23) [~~(19)~~] Tuition--Statutory tuition, designated and/or Board-authorized tuition.

§22.228. Eligible Students.

(a) All persons who receive an initial award through the TEXAS Grant Program prior to fall 2013, and all initial award recipients attending public community colleges, technical colleges or the Lamar Institute of Technology in fall 2013 or later [~~To receive an initial award through the TEXAS Grant Program, a student~~] must:

(1) - (5) (No change.)

(6) have completed the Recommended or Advanced High School Program, or if a graduate of a private high school, its equivalent, unless the student:

(A) (No change.)

(B) was anticipated to [~~did not~~] graduate under the Recommended or Advanced High School Program or meet the academic requirements as outlined by subsection (b)(5) of this section [~~as anticipated~~] when the award was made; or

(C) has received an associate degree from an eligible institution no earlier than May 1, 2001; or

(D) was anticipated to receive an associate degree from an eligible institution within 12 months of enrolling for fall 2013 or a later term;

(7) (No change.)

(8) have a statement on file with his or her institution that indicates the student is registered with the Selective Service System as required by federal law or is exempt from selective service registration under federal law; and

[~~(9) have an expected family contribution that does not exceed the limit set by the Board for the relevant state fiscal year; and~~]

(9) [~~(10)~~] if awarded the grant on or after September 1, 2005, be enrolled in an institution of higher education.

(b) Beginning with awards made for the fall 2013 semester, to receive an initial TEXAS Grant award, a person graduating high school on or after May 1, 2013 and enrolling in a general academic teaching institution must:

(1) be a resident of Texas;

(2) show financial need as defined by the Board;

(3) have applied for any available financial aid or assistance;

(4) not have been granted a baccalaureate degree;

(5) meet the academic requirements prescribed by subparagraph (A), (B), or (C) of this paragraph:

(A) graduate or be on track to graduate from a public or accredited private high school in Texas and complete or be on track to complete the Recommended High School Curriculum or its equivalent and on track to have accomplished any two or more of the following at the time the award was made:

(i) graduation under the advanced high school program established under Texas Education Code, §28.025 or its equivalent, successful completion of the course requirements of the international baccalaureate diploma program, or earning of the equivalent of at least 12 semester credit hours of college credit in high school through courses described in Texas Education Code, §28.009(a)(1), (2), and (3);

(ii) satisfaction of the Texas Success Initiative (TSI) college readiness benchmarks prescribed by the Coordinating Board under Texas Education Code, §51.3062(f) on any assessment instrument designated by the Coordinating Board under Texas Education Code, §51.3062(c) or (e) or qualification for an exemption as described by Texas Education Code, §51.3062(p), (q), or (q-1);

(iii) graduation in the top one-third of the person's high school graduating class or graduation from high school with a grade point average of at least 3.0 on a four-point scale or the equivalent; or

(iv) completion for high school credit of at least one advanced mathematics course following the successful completion of an Algebra II course, as permitted by Texas Education Code, §28.025(b-3), or at least one advanced career and technical course, as permitted by Texas Education Code, §28.025(b-2);

(B) have received an associate degree or be on track to receive an associate's degree from a public or private institution of higher education at the time the award was made; or

(C) if sufficient money remains, meet the eligibility criteria described by subsection (a) of this section;

(6) enroll in an undergraduate degree or certificate program at a general academic teaching institution on at least a three-quarter time basis as:

(A) an entering undergraduate student not later than the end of the 16th month after high school graduation; or

(B) an entering undergraduate student who entered military service not later than the first anniversary of the date of high school graduation and enrolled in a general academic teaching institution no later than 12 months after being honorably discharged from military service; or

(C) a continuing undergraduate not later than the end of the 12th month after the calendar month in which the student received an associate degree; and

(7) have a statement on file with his or her institution that indicates the student is registered with the Selective Service System as required by federal law or is exempt from selective service registration under federal law.

(c) [~~(b)~~] To receive a continuation award through the TEXAS Grant Program, a student must:

(1) have previously received an initial award through this program;

(2) show financial need;

(3) be enrolled at least three-quarter time unless granted a hardship waiver of this requirement under §22.231 of this title (relating to Hardship Provisions);

(4) be enrolled in an undergraduate degree or certificate program at an approved institution;

(5) not have been granted a baccalaureate degree;

(6) have a statement on file with his or her institution that indicates the student is registered with the selective service system as required by federal law or is exempt from selective service registration under federal law; and

(7) make satisfactory academic progress towards an undergraduate degree or certificate, as defined in §22.229 of this title (relating to Satisfactory Academic Progress).

(8) If a student's eligibility was based on the expectation that the student would complete the Recommended or Advanced High School Program, meet the academic requirements as outlined in subsection (b)(5) of this section, or acquire an associate's degree and the student failed to do so, then in order to resume eligibility such a student must:

(A) receive an associate's degree;

(B) meet all other qualifications for a TEXAS Grant; and

(C) if required to do so by the institution through which the TEXAS Grant was made, repay the amount of the TEXAS Grant that was previously received.

(d) In determining initial student eligibility for TEXAS grant awards pursuant to subsections (a) and (b) of this section, priority shall be given to those students who have an expected family contribution that does not exceed the lesser of the limit set by the Board for the relevant fiscal year or 60 percent of the average statewide amount of tuition and fees for general academic teaching institutions for the relevant academic year.

§22.231. Hardship Provisions.

(a) No student enrolled for fewer than six hours may receive a TEXAS Grant. However, in [~~In~~] the event of a hardship or for other good cause, the Program Officer at an eligible institution may allow an otherwise eligible person to receive a TEXAS Grant while enrolled for an equivalent of six to nine semester credit hours [~~less than three-quarter time~~] or if the student's grade point average or completion rate or number of completed hours falls below the satisfactory academic progress requirements of §22.229 of this title (relating to Satisfactory Academic Progress). Such conditions are not limited to, but include:

(1) - (3) (No change.)

(b) - (d) (No change.)

§22.234. Award Amounts and Adjustments.

(a) (No change.)

(b) Award Amounts.

(1) - (6) (No change.)

(7) No person enrolled for fewer than six semester credit hours may receive a TEXAS Grant. In addition, an [~~An~~] award to an otherwise eligible student enrolled for less than a three quarter-time load due to hardship is to be prorated. The amount he/she can be awarded is equal to the semester's maximum award for the relevant type of institution, divided by twelve hours and multiplied by the actual number of hours for which the student enrolled.

(c) - (d) (No change.)

(e) Prorated Awards. If [~~a student's need is insufficient to allow him or her to receive a full award in a given term or semester, or if~~] the student's balance of eligible hours is less than the number of hours he or she is taking in a given term or semester, the student's award amount for that term or semester should be prorated. Beginning no later than Fiscal Year 2012, prorated amounts shall be calculated using the following schedule:

(1) If balance of hours = [~~enrolled for~~] 12 or more hours - 100% of the maximum award;

(2) If balance of hours = [~~enrolled for~~] 9-11 hours - 100% [~~75%~~] of the maximum award;

(3) If balance of hours = [~~enrolled for~~] 6-8 hours - 50% of the maximum award; and

(4) If balance of hours = [~~enrolled for~~] fewer than 6 hours and student is enrolled for at least 6 hours - 25% of the maximum award.

§22.236. Allocation and Reallocation of Funds.

(a) Allocations.

(1) Initial Year Funds. Available program funds for initial year awards will be allocated to each participating institution in proportion to each institution's share of the state's undergraduate financial aid population with significant amounts of financial need, except that, beginning with September 1, 2005, no additional initial year funds will be allocated to private or independent institutions. No allocations of initial year funds are to be impacted by an institution's number of initial award recipients who met the priority model requirements described in §22.228(b)(5) of this title (relating to Eligible Students).

(2) (No change.)

(b) - (d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205357
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: January 24, 2013
For further information, please call: (512) 427-6114

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19 TAC §22.241, §22.242

The Texas Higher Education Coordinating Board (Coordinating Board) proposes new §22.241 and §22.242, concerning Toward EXcellence, Access, and Success (TEXAS) Grant Program. Specifically, the new sections add language to implement legislative changes mandated by the 82nd Legislature in Senate Bill 28. Section 22.241 outlines provisions for making awards in the future to students who were unable to receive grants as entering freshmen because of insufficient funding for the program. Section 22.242 describes new reporting requirements for the TEXAS Grant Program. The new reports are to be

provided annually to the TEXAS Grant Oversight Committee, beginning with reports on Fiscal Year 2014 program operations.

Dan Weaver, Assistant Commissioner for Business and Support Services, has estimated that for each year of the first five years the new sections are in effect there will be no fiscal implications to state or local government as a result of enforcing or administering the sections.

Mr. Weaver has also determined that for each year of the first five years the new sections are in effect, the public benefits anticipated as a result of administering the sections will be to have a plan in place for assisting students if program funding is significantly decreased, and to provide the Legislature with data that can be used to assess the success of the TEXAS Grant program. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Dan Weaver, P.O. Box 12788, Austin, Texas 78711; (512) 427-6165; Dan.Weaver@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The new sections are proposed under Texas Education Code, §56.303, which provides the Coordinating Board with the authority to adopt rules to implement the TEXAS Grant Program.

The new sections affect Texas Education Code, §§56.301 - 56.311.

§22.241. Tolling of Eligibility for Initial Award.

(a) A person is eligible for consideration for an Initial Year TEXAS Grant award under this subsection if the person was eligible for an award under §22.228 of this title (relating to Eligible Students) in an academic year for which the Texas Legislature failed to appropriate sufficient funds to make awards to at least 10 percent of the eligible student population, and:

(1) has not received an award under this subchapter in the past;

(2) has not received a baccalaureate degree; and

(3) meets the eligibility requirements for a continuation award as described in §22.228(c) of this title.

(b) A person who meets the requirements outlined in subsection (a) of this section:

(1) cannot be disqualified for a TEXAS Grant by changes in program requirements since the time he or she was originally eligible or by the amount of time that has passed since he or she was originally eligible;

(2) is to receive highest priority in the selection of recipients if he or she met the priority model requirements of §22.228(b)(5) of this title when originally determined to be eligible;

(3) may continue receiving awards as long as he or she meets the requirements for such awards; and

(4) may not receive awards for prior terms.

§22.242. Reports to the Texas Grant Oversight Committee.

No later than September 1 of each year, and beginning with awards made for the fall 2013 semester, the Board shall provide a report to the committee that will include the following information about the TEXAS Grant awards for the three preceding state fiscal years:

(1) allocations, by institution, separately for initial and continuation awards;

(2) number of awards received, by race, ethnicity and family contribution;

(3) number of awards received by race, ethnicity and family contribution, separately for persons who received awards on the basis of program requirements outlined in §22.228 of this title (relating to Eligible Students); and

(4) the persistence, retention, and graduation rates for award recipients.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205358
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: January 24, 2013
For further information, please call: (512) 427-6114

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TITLE 22. EXAMINING BOARDS

PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 347. REGISTRATION OF PHYSICAL THERAPY FACILITIES

22 TAC §347.9

The Texas Board of Physical Therapy Examiners proposes amendments to §347.9, regarding Renewal of Registration. The amendments would move language within the section, would move information about renewal late fees from §347.12 to this section, and would delete confusing language regarding a registration status (delayed status) that no longer is used. The logic of renewal or restoration of facility registrations would match that of renewal or restoration of individual licenses.

John P. Maline, Executive Director, has determined that for the first five-year period these amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering these amendments.

Mr. Maline has also determined that for each year of the first five-year period these amendments are in effect the public benefit will be clearer information about the renewal requirements and the renewal late fees for facilities. Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore an economic impact statement or regulatory flexibility analysis is not required for the amendment. There are no anticipated costs to individuals who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nina.hurter@ptot.texas.gov.

Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register.*

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by these amendments.

§347.9. Renewal of Registration.

(a) The owner of a physical therapy facility must renew the registration annually. Licensees may not provide physical therapy services in a facility if the registration is not current. The Board will maintain a secure resource for verification of registration status and expiration date on its website.

(b) Requirements to renew a facility registration are:

(1) a renewal application signed by the owner, managing partner or officer, or a person authorized by the owner to complete the renewal;

(2) a list of all PTs and PTAs working at the facility, including license and social security numbers;

(3) the renewal fee as set by the executive council, and any late fees which may be due; and

(4) a physical therapist in charge form with the signature of the physical therapist.

(c) The renewal date of a facility registration is the last day of the month in which the registration was originally issued, or as synchronized with the first facility registered by an owner.

(d) The board will notify a facility at least 30 days prior to the registration expiration date. The facility bears the responsibility for ensuring that the registration is renewed. Failure to receive notification from the board does not exempt the facility from paying the renewal fee in a timely manner.

(e) Late Renewal. Late fees will be assessed if all items required for renewal are not postmarked prior to the expiration date of the license. Facility owners who do not submit all required items prior to the expiration date are subject to late fees as described.

(1) If the facility registration has been expired for 90 days or less, the late fee is half of the renewal fee.

(2) If the facility registration has been expired for more than 90 days but less than one year, late fee is equal to the renewal fee.

(3) If the facility registration has been expired for one year or more, the facility owner must restore the license as described in §347.12 of this title (relating to Restoration of Registration).

(f) An owner may not register a new facility in lieu of renewal of an expired registration for a facility in the same location.

~~[(e) Physical Therapy services may not be provided at a facility without a current registration. The Board will maintain a secure resource for verification of registration status and expiration date on its website.]~~

~~[(f) A facility will be allowed to renew without a late fee if the renewal application and fee are received prior to the expiration date. However, the renewal is not complete prior to the receipt of the signed physical therapist in charge form and a list of the name(s) of the PTs and PTAs working at that facility. Physical therapy services may not be provided at the facility until the facility registration is current.]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 9, 2012.

TRD-201205259
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 305-6900

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22 TAC §347.12

The Texas Board of Physical Therapy Examiners proposes amendments to §347.12, regarding Restoration of Registration. The amendments would move information about late fees to §347.9, regarding Renewal of Registration, would set up two restoration fees based on notification of facility closure or the lack thereof, and establish clearer information about restoration fees. The logic of renewal or restoration of facility registrations would match that of renewal or restoration of individual licenses.

John P. Maline, Executive Director, has determined that for the first five-year period these amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering these amendments.

Mr. Maline has also determined that for each year of the first five-year period these amendments are in effect the public benefit will be less onerous restoration fees and clearer instructions regarding restoration and renewal of facility registrations. Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore an economic impact statement or regulatory flexibility analysis is not required for the amendment. There are no anticipated costs to individuals who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nina.hurter@ptot.texas.gov.

Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register.*

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by these amendments.

§347.12. Restoration of Registration.

(a) When a facility registration is cancelled or expired for one year or more, the owner may restore the registration by submitting the following:

(1) a restoration application;

(2) a restoration fee; and

(3) a therapist in charge form signed by the therapist in charge.

[(a) When a facility fails to renew its registration before the expiration date, the facility may restore the registration by completing the renewal requirements and paying renewal and restoration fees as set out by the Executive Council.]

[(1) If the facility registration has been expired for 90 days or less, the facility may renew by paying the required renewal fee and a restoration fee that is one-half of the renewal fee.]

[(2) If the facility registration has been expired for more than 90 days but less than one year, the facility may renew by paying all unpaid renewal fees and a restoration fee that is equal to the renewal fee.]

[(3) If the facility registration has been expired for more than one year, the facility may renew the registration by paying all unpaid renewal fees and a restoration fee which is double the renewal fee.]

(b) Restoration fees.

(1) If the owner cancelled the facility registration in writing, the restoration fee is the same as the renewal fee.

(2) If the facility owner did not cancel the registration in writing and the registration expired, the fee is twice the renewal fee.

[(b) The owner of a facility may cancel a facility registration if physical therapy services will no longer be provided at that facility. To cancel a registration, the owner must notify the board in writing. If the owner decides to resume the provision of physical therapy services at a future date, the facility registration may be restored with the previous expiration date by meeting the requirements in §347.9 of this title (relating to Renewal of Registration).]

(c) An owner may not register a new facility in lieu of [renewal or] restoration of a previously registered facility in the same location.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 9, 2012.

TRD-201205258
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 305-6900

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22 TAC §347.13

The Texas Board of Physical Therapy Examiners proposes new §347.13, regarding Cancellation of Registration. The new rule would move information about cancellation of a facility registration from §347.12, regarding Restoration of Registration, to a new section.

John P. Maline, Executive Director, has determined that for the first five-year period this new rule is in effect there will be no additional costs to state or local governments as a result of enforcing or administering the rule

Mr. Maline has also determined that for each year of the first five-year period the rule is in effect the public benefit will be clearer information about cancellation of facility registrations. Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore an economic impact statement or regulatory flexibility analysis is not required for the rule. There are no anticipated costs to individuals who are required to comply with the rule as proposed.

Comments on the proposed rule may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nina.hurter@ptot.texas.gov.

Comments must be received no later than 30 days from the date this proposed rule is published in the *Texas Register.*

The new rule is proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by the rule.

§347.13. Cancellation of Registration.

The owner of a facility may cancel a facility registration if physical therapy services will no longer be provided. To cancel a registration, the owner must notify the board in writing that physical therapy services are no longer being provided at that location. If the owner decides to resume the provision of physical therapy services at a future date, the facility registration may be restored with the previous expiration date by meeting the requirements in §347.12 of this title (relating to Restoration of Registration).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 9, 2012.

TRD-201205257
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 305-6900

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TITLE 34. PUBLIC FINANCE

PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

CHAPTER 101. PRACTICE AND PROCEDURE REGARDING CLAIMS

34 TAC §101.3

The Texas County and District Retirement System (TCDRS) proposes an amendment to §101.3, concerning the filing of documents. The current rule generally provides that documents must be filed with the director at the office of the system in Austin, Texas, and are deemed filed with the system when actually received. The proposed rule clarifies that all documents filed with the system are deemed filed when received.

Tom Harrison, General Counsel of the Texas County and District Retirement System, has determined that for the first five-year

period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Harrison has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be consistent rule language which clarifies that all documents filed with the system are not deemed filed until actually received. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Tom Harrison, General Counsel of the Texas County and District Retirement System, P.O. Box 2034, Austin, Texas 78768-2034.

The amendment is proposed under the Government Code, §845.102, which authorizes the board of trustees of the Texas County and District Retirement System to adopt rules concerning the efficient administration of the system.

The Government Code, §844.010, is affected by this proposed amendment.

§101.3. Filing of Documents.

All applications, beneficiary designations, administrative elections, petitions, complaints, replies, and other pleadings seeking to institute any claim, complaint, or other proceeding under the Act, [~~or~~] relating to any such proceeding then pending (other than one that has become a "contested case"), or seeking to exercise a right or perform an administrative action under the Act shall be filed with the director at the offices of the system in Austin. Such instruments shall be deemed filed only when actually received, accompanied by the filing fee, if any, required by statute or by rules of the board. An instrument may be filed electronically in accordance with §107.9 of this title (relating to Electronic Filing of Documents). If a proceeding becomes a "contested case", documents shall thereafter be filed in accordance with §§101.16 - 101.22 of this title.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 13, 2012.

TRD-201205350
Tom Harrison
General Counsel
Texas County and District Retirement System
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 637-3247

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CHAPTER 103. CALCULATIONS OR TYPES OF BENEFITS

34 TAC §103.11

The Texas County and District Retirement System (TCDRS) proposes an amendment to §103.11, concerning the optional Group Term Life program it administers. The proposed amendment would replace obsolete language with the current language. In 2007, the Texas Legislature changed the name of the life insurance program. The purpose of the proposed amendment is to eliminate references to the old term "Supplemental Death Benefit" and replace them with the current term "Group Term Life".

Tom Harrison, General Counsel of the Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Harrison has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be that the rule will accurately reflect the current TCDRS language. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Tom Harrison, General Counsel of the Texas County and District Retirement System, P.O. Box 2034, Austin, Texas 78768-2034.

The amendment is proposed under the Government Code, §845.102, which authorizes the board of trustees of the Texas County and District Retirement System to adopt rules and perform reasonable activities necessary or desirable for efficient administration of the system.

No other statutes, articles, or codes are affected by this proposed amendment.

§103.11. Group Term Life Benefit [~~Supplemental Death Benefit~~] Based on Extended Coverage.

(a) A member of the retirement system, who had coverage in the Group Term Life benefit [~~supplemental death benefit~~] program during the last month the member was required to make a contribution to the retirement system and who dies within 24 calendar months following that month, is considered to have received extended coverage in the Group Term Life benefit [~~supplemental death benefit~~] program provided that the member was unable to engage in gainful employment or was on leave of absence under the Family and Medical Leave Act of 1993 ("the FMLA") throughout the period beginning with the date of the member's last required contribution and ending on the date of the member's death.

(b) The person making the claim for payment of a Group Term Life benefit [~~a supplemental death benefit~~] based on extended coverage has the burden of establishing that the deceased member was unable to engage in gainful employment or was on leave under the FMLA throughout the entire period of extended coverage, and the claimant must provide evidence satisfactory to the retirement system of that fact.

(c) The following are examples of documents relating to the member that may assist the claimant in meeting this burden of proof:

(1) copy of the decedent's death certificate;

(2) certified statements of attending physicians;

(3) certified statements of caregivers and custodians;

(4) certified statements of subdivisions regarding absences under the FMLA;

(5) certified statements of individuals having personal knowledge of the decedent's education, training and work experience;

(6) copies of the decedent's tax returns covering the period of extended coverage;

(7) findings of the Social Security Administration, Workers Compensation Commission or other entities providing compensation for disability, illness or injury.

(d) In its determination of a claim filed under this section, the retirement system may consider whether the impairment or incapacity affecting the decedent's ability to engage in gainful employment could

have been safely diminished by the decedent with reasonable effort to the extent that the decedent would have been able to engage in gainful employment.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Tom Harrison
General Counsel
Texas County and District Retirement System
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CHAPTER 105. CREDITABLE SERVICE

34 TAC §105.5

The Texas County and District Retirement System (TCDRS) proposes an amendment to §105.5, concerning the requirement that a governing body approve any corrections of error as it relates to service. The current rule requires the governing body of the employer to approve any adjustments that relate to service of more than 12 months or that relate to service that occurred more than 12 months before the adjustment. Depending on the nature of the correction, the director may wish to require the approval of the governing body for adjustments that do not fit within this general 12-month rule. Similarly, adjustments that currently trigger approval of the governing body may be sufficiently routine as to not require governing body approval. This proposed amendment modifies subsection (m) and provides the director the discretion to determine when governing body approval is required.

Tom Harrison, General Counsel of the Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Harrison has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be an improvement to the correction of error process in which only significant adjustments require governing body approval. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Tom Harrison, General Counsel of the Texas County and District Retirement System, P.O. Box 2034, Austin, Texas 78768-2034.

The amendment is proposed under the Government Code, §845.102, which authorizes the board of trustees of the Texas County and District Retirement System to adopt rules concerning the efficient administration of the system.

The Government Code, §842.112(b), is affected by this proposed amendment.

§105.5. Correction of Errors by Employers: Record Adjustments.

(a) The sponsoring employer is responsible for the correction of an error arising from an act or omission of the employer that results in a person contributing more or less than the correct amount to the system or receiving more or less credited service, service credit or benefits than the person is rightfully entitled to receive under the system.

(b) The employer may initiate the correction process by filing an application with the system for an adjustment to the person's record. The application must adequately describe the error and set forth the terms of the adjustment to be made to the person's record.

(c) A person seeking an adjustment to a record based on an act or omission of the subdivision must apply to the sponsoring employer for a correction of the error. The system will not receive applications for record adjustments from any person other than an employer. If the system receives information relating to a possible error from a person other than an employer, the system shall forward the information to the appropriate employer.

(d) If the director is provided with satisfactory evidence of the error, the director may at his discretion accept the application and order an adjustment to the person's record in accordance with the terms set forth in the application provided:

(1) The terms of the adjustment on the face of the application would not grant the person a right, status or benefit not otherwise available under Texas Government Code, Title 8, Subtitle F [~~this subtitle~~];

(2) The terms of the adjustment are reasonable and can be feasibly implemented and administered by the system; and

(3) The terms of the adjustment can be implemented without causing financial instability with respect to the employer's participation in the system or causing a reduction in the accrued benefit of any other member or annuitant of the employer.

(e) In this section the term "record" means all information and amounts relating to the person and the person's beneficiary and includes information and amounts relating to the person's individual account, contributions, deposits, credited service, service credit and benefits.

(f) In this section the term "individual account" means the separate account maintained for a member consisting of the member's contributions, deposits and accumulated interest credited to the account for the benefit of the member.

(g) In this section the term "credited service" means months of service recognized for purposes of retirement eligibility.

(h) In this section the term "service credit" means the monetary credits granted to a member who performs service for a participating employer.

(i) In this section the term "filed" means received by the system.

(j) In this section the term "accepted" means approved by the system for making adjustments to a person's record in accordance with the terms of the application.

(k) The application of a sponsoring employer under this section may be filed at any time.

(l) All applications filed under this section with the system must be certified by the sponsoring employer before the application may be accepted.

(m) Depending on the nature of adjustment requested pursuant to this section, the director may require that [~~If an adjustment pursuant to this section relates to a period of service that is greater than 12 months or ended more than 12 months prior to the application filing date,~~] the application must be approved by the governing board of the employer before it may be accepted by the system.

(n) If the terms of the adjustment as set forth on the application specify a change to the person's months of credited service, that adjustment will be made upon acceptance of the application and receipt by the system of the amount that would have been contributed by the member for those specified months. The system will not accept any payments due under this section from any person other than an employer.

(o) If the terms of the adjustment as set forth on the application specify a change to the person's individual account balance, service credit or benefit, that adjustment may not be made until the system receives any payment necessary to implement the terms of the adjustment. The system will not accept any payments due under this section from any person other than an employer.

(p) With respect to certain errors that are the subject of an adjustment under this section, the sponsoring employer may request the system to provide a description of what the person's record would show if no error had occurred. This description may include changes to amounts of employee contributions, accumulated interest, prior service credit, current service credit, multiple matching credit, retirement benefits, or retirement eligibility dates. Evidence showing dates of service and the compensation that was paid to the member by the employer for such service should be submitted to the system in order that the system may accurately determine any changes.

(q) The application may specify adjustments in any amounts that do not exceed the changes to the person's record determined as if there had been no error.

(r) An application for an adjustment is not an application for retirement; however, a retirement application may be filed simultaneously with an application for adjustment. An adjustment to a person's prior service credit may not be made if the application is filed more than five years after the date the person became a member of the sponsoring employer.

(s) Adjustments to service credits or benefits shall be considered as part of, and funded in the same manner as, any other pension liabilities of the employer.

(t) The director may implement the terms of the proposed adjustment to the extent that the funding of the pension liabilities attributable to the adjustments proposed by the employer do not cause financial instability with respect to the employer's participation in the system or cause a reduction in accrued benefits of any other members or annuitants. This may include partial implementation or implementation of the adjustments in stages.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Tom Harrison
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CHAPTER 107. MISCELLANEOUS RULES

34 TAC §107.10

The Texas County and District Retirement System (TCDRS) proposes an amendment to §107.10, concerning the optional Group Term Life program it administers. The proposed amendment would replace obsolete language with the current language. In 2007, the Texas Legislature changed the name of the life insurance program. The purpose of the proposed amendment is to eliminate references to the old term "Supplemental Death Benefit" and replace them with the current term "Group Term Life".

Tom Harrison, General Counsel of the Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Harrison has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be that the rule accurately reflects the current TCDRS language. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Tom Harrison, General Counsel of the Texas County and District Retirement System, P.O. Box 2034, Austin, Texas 78768-2034.

The amendment is proposed under the Government Code, §845.102, which authorizes the board of trustees of the Texas County and District Retirement System to adopt rules and perform reasonable activities necessary or desirable for efficient administration of the system.

No other statutes, articles, or codes are affected by this proposed amendment.

§107.10. Treatment of Ineligible Benefit Payments.

(a) In this section the term "ineligible benefit payment" means that portion of a payment or distribution, other than a Group Term Life benefit [~~a supplemental death benefit~~] payment, made by the retirement system to, or on behalf of, a living or deceased person who was not legally entitled to the payment at the time it was made. An ineligible benefit payment is a receivable of the system.

(b) In this section the term "recipient" means the person or persons who, directly or indirectly, received an ineligible benefit payment.

(c) If a repayment of an ineligible benefit payment is not received by the retirement system, the system may offset the amount of the ineligible benefit payment against future benefit payments otherwise due the recipient.

(d) If the board determines that an ineligible benefit payment is not recoverable, the receivable shall be charged against the general reserves account of the endowment fund provided the ineligible benefit payment was not the result of an error or omission of a participating subdivision.

(e) If the board determines that the ineligible benefit payment was the result of an error or omission of a participating subdivision and determines that the payment is not recoverable, the receivable shall be charged against the subdivision's account in the subdivision accumulation fund.

(f) In making its determination, the board may consider the amount of the ineligible benefit payment, the likelihood of repayment, the costs of recovery, and any other fact or circumstance which the board considers to be relevant in finding that further efforts for the recovery of the payment are not in the best interests of the retirement system, its members and annuitants.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Tom Harrison
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CHAPTER 109. DOMESTIC RELATIONS ORDERS

34 TAC §109.6

The Texas County and District Retirement System (TCDRS) proposes an amendment to §109.6, concerning the optional Group Term Life program it administers. The proposed amendment would replace obsolete language with the current language. In 2007, the Texas Legislature changed the name of the life insurance program. The purpose of the proposed amendment is to eliminate references to the old term "Supplemental Death Benefit" and replace them with the current term "Group Term Life".

Tom Harrison, General Counsel of the Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Harrison has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be that the rule accurately reflects current TCDRS language. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Tom Harrison, General Counsel of the Texas County and District Retirement System, P.O. Box 2034, Austin, Texas 78768-2034.

The amendment is proposed under the Government Code, §845.102, which authorizes the board of trustees of the Texas County and District Retirement System to adopt rules and perform reasonable activities necessary or desirable for efficient administration of the system.

No other statutes, articles, or codes are affected by this proposed amendment.

§109.6. Order Should Divide All Benefits.

(a) Under the Act, a participant's accumulated contributions (with interest as allowed thereon under the Act) may become payable to a participant upon terminating subdivision employment and membership in the system prior to retirement, as set forth in the Act, §842.108, or may become payable to the participant's designee or estate under the Act, §844.401, in the event of the participant's death prior to retirement. A domestic relations order regarding a participant who has not yet retired should clearly state the basis upon which any portion of such sums should be payable to an alternate payee. In the event that a domestic relations order does not clearly state how interest allowed on the contributions is to be divided, it will be divided (upon any payment of accumulated contributions under either the Act, §842.108 or §844.401) pro rata on the basis that the amount awarded to the alternate payee bears to the total accumulated contributions.

(b) Under the Act, a service retirement benefit or a disability retirement benefit may become payable to the participant (and, upon the participant's death, to a designee) as set forth in the Act, §§844.101-844.106 and §§844.301-844.305. A domestic relations order regarding a participant should clearly state the basis upon which any portion of such retirement benefit should be payable to an alternate payee.

(c) A Group Term Life benefit [~~A supplemental death benefit~~] may become payable under the Act, §844.503 or §844.504, upon the death of a participant who was or had been employed by certain of the subdivisions participating in the system. That benefit is not the property of a participant, but rather is a benefit that is paid by the system as a result of the death of a participant. If any portion of such benefit becomes payable to an alternate payee under the express wording of a qualified domestic relations order, it will be so paid upon the death of the participant; however, if the domestic relations order does not specifically provide that some portion of that benefit is to be paid to an alternate payee, then no portion of the Group Term Life benefit [~~supplemental death benefit~~] shall be paid otherwise than as set forth in the Act, §844.505.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Tom Harrison
General Counsel
Texas County and District Retirement System
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PART 6. TEXAS MUNICIPAL RETIREMENT SYSTEM

CHAPTER 125. ACTIONS OF PARTICIPATING MUNICIPALITIES

34 TAC §125.7

The Board of Trustees ("Board") of the Texas Municipal Retirement System ("TMRS") proposes amendments to 34 TAC §125.7, Optional Additional Contributions to Municipal Accumulation Fund. The section concerns the ability of a TMRS participating municipality to make optional additional contributions to its municipal account in TMRS. The proposed amendment modifies subsection (a) and the section title heading and changes the term "municipal accumulation fund" to the term "benefit accumulation fund" in order to conform with the "benefit accumulation fund" terminology now used throughout Title 8, Subtitle G, Chapters 851 through 855 of the Texas Government Code (the "TMRS Act").

During the 82nd Legislative Session of the Texas Legislature, Senate Bill 350 ("SB 350") was enacted into law, which provided for the restructuring of fund obligations and accounts of TMRS. As part of such fund restructuring, the TMRS Act was amended

to provide that the fund account known as the "municipality accumulation fund" was renamed the "benefit accumulation fund" and the assets and liabilities of the fund accounts formerly known as the "employees saving fund" and the "current service annuity reserve fund" were transferred to the benefit accumulation fund as described in SB 350. To conform with such statutory changes, §125.7 will be amended to replace the term "municipal accumulation fund" with the term "benefit accumulation fund". On September 21, 2012, the Board approved the publication of this proposed amendment for comment.

David Gavia, Executive Director of TMRS, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local governments as a result of administering the amendment as proposed. The proposed amendment simply modifies terminology used in the section to reflect a change in a defined term used in the TMRS Act and thus would have no new fiscal implications.

Mr. Gavia has also determined that for each year of the first five years that the proposed amendment would be in effect the public benefit anticipated as a result of administering the amendment as proposed would be to clarify the section provisions, which would now conform to the terminology used in the TMRS Act. There is no anticipated economic cost to persons required to comply with the proposed amendments. The section affects TMRS participating municipalities but not individual members, so individuals will not be affected by the proposed amendment. Mr. Gavia has determined that there will be no effect on a local economy because of the proposed amendment to the section, and therefore no local employment impact statement is required under §2001.022 of the Texas Government Code. Mr. Gavia has also determined that there will be no direct adverse economic effect on small businesses or micro-businesses within TMRS' regulatory authority as a result of the amended section; therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under §2006.002 of the Texas Government Code.

Comments may be submitted in writing to Christine M. Sweeney, General Counsel, TMRS, P.O. Box 149153, Austin, Texas 78714-9153, faxed to (512) 225-3786, or submitted electronically to Ms. Sweeney at *csweeney@tmrs.com.* Written comments must be received by TMRS no later than 30 days from the date of publication of the proposed amendment in the *Texas Register.*

Statutory Authority: The amendment is proposed under Texas Government Code §855.4065, which authorizes the Board to adopt rules allowing participating municipalities to make optional additional contributions to be deposited in the municipality's account in the benefit accumulation fund, and under Texas Government Code §855.102, which grants the Board authority to adopt rules necessary or desirable for the efficient administration of the retirement system.

Cross-reference to Statute: The proposed amendment affects Texas Government Code §855.4065. In general, §125.7 also affects the following statutes: Government Code §855.407, providing limitations on municipality contribution rates, and Government Code §855.501, providing for increased current service annuities.

§125.7. Optional Additional Contributions to Benefit Accumulation Fund [~~Municipal Accumulation Fund~~].

(a) Effective January 1, 2008, a municipality may make deposits in excess of its actuarially required contribution to its account in the benefit accumulation fund [~~Municipal Accumulation Fund~~]. The deposit may be in the form of a lump sum payment or periodic payments. All funds deposited in a municipality's account in the benefit accumulation fund [~~Municipal Accumulation Fund~~] are held in trust by the retirement system and cannot be returned to the municipality.

(b) The retirement system retains the right to not accept a payment if, in the opinion of the director, acceptance of the payment would result in an unreasonable administrative or investment burden. A decision by the director to not accept a contribution may be appealed to the Board of trustees.

(c) A contribution made in accordance with this section is not subject to the maximum contribution rules under §855.407 and §855.501 of the Act.

(d) The retirement system may adopt reasonable policies and procedures to administer this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

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David Gavia
Executive Director
Texas Municipal Retirement System
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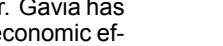

CHAPTER 127. MISCELLANEOUS RULES

34 TAC §127.4

The Board of Trustees ("Board") of the Texas Municipal Retirement System ("TMRS") proposes amendments to 34 TAC §127.4, Credited Service under the Uniformed Services Employment and Reemployment Rights Act. The section concerns contributions, benefits, and service credit intended to comply with the Uniformed Services Employment and Reemployment Rights Act ("USERRA") and §414(u) of the Internal Revenue Code of 1986, as amended ("IRC"), as well as the Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART Act") and IRC §401(a)(37). The proposed amendments modify subsection (c)(2)(C) and (E) and add new subsections (d), (e) and (f).

The proposed amendment to subsection (c)(2)(C) is nonsubstantive and changes the word "credit" to "deposits" to conform with terminology used throughout the section. The proposed amendment to subsection (c)(2)(E) specifies that an eligible TMRS member will be permitted to deposit employee contributions to his or her individual account that would have been made to the account during periods of confirmed uniformed service provided the deposits are either paid directly to TMRS by the eligible member or are paid by the member utilizing a rollover or transfer of funds in accordance with the provisions of 34 TAC §127.6 (relating to the Acceptance of Rollovers and Transfers). The proposed amendment to subsection (c)(2)(E) also provides that the deposits shall retain the same after-tax or pre-tax characterization that the funds have when deposited with TMRS.

Proposed new subsections (d), (e), and (f) specifically state certain IRC rules applicable to qualified retirement plans, in compliance with applicable provisions of the HEART Act. The proposed addition of new subsections (d), (e), and (f) would amend the section to: (i) effective as of January 1, 2007, provide the beneficiary of a TMRS member who dies while performing "qualified military service" with any additional benefits (other than benefit accruals related to the period of qualified military service) that would have been provided to the member had the member resumed employment and then died; (ii) expressly state that (I) for TMRS purposes, compensation includes military differential pay made by a participating municipality to a member while performing qualified military service and (II) for IRC purposes, effective January 1, 2009, a member receiving military differential pay is treated as an employee of the employer making the payment and such differential pay will be treated as compensation; and (iii) provide that the section is intended to comply with, and will be construed to be consistent with, USERRA and IRC §401(a)(37) and §414(u).

Title 8, Subtitle G, Chapters 851 through 855 of the Texas Government Code (the "TMRS Act") applies to TMRS. Texas Government Code §855.102 allows the Board to adopt rules it finds necessary or desirable for the efficient administration of TMRS. Additionally, Texas Government Code §853.506 provides that contributions, benefits, and service credit for qualified military service will be provided in accordance with IRC §414(u) and allows the Board to adopt rules that modify the terms of the TMRS Act for the purpose of compliance with USERRA. Further, Texas Government Code §855.607 provides that the TMRS Act is to be construed and administered in a manner that the TMRS retirement benefit plan will be considered a tax-qualified plan under IRC §401(a) and allows the Board to adopt rules that modify the plan to the extent the Board considers necessary for TMRS to be considered a qualified plan. IRC §414(u) provides special rules regarding the interaction of USERRA with the rules governing tax-qualified retirement plans. The HEART Act added IRC §401(a)(37) and §414(u)(12)(A) as additional military service related provisions applicable to tax-qualified retirement plans. The HEART Act requires that for governmental plans, such as TMRS, written plan amendments to reflect the above-described HEART Act provisions be made on or before the end of the 2012 plan year. The TMRS 2012 plan year will end on December 31, 2012.

The proposed amendments of 34 TAC §127.4 implement the authority granted to the Board in Texas Government Code §§855.102, 853.506, and 855.607 to adopt rules as described above. Pursuant to Texas Government Code §855.607, rules adopted by the Board relating to plan qualifications issues are considered a part of the plan. On September 21, 2012, the Board approved the publication of these proposed amendments for comment.

David Gavia, Executive Director of TMRS, estimates that, for the first five-year period the amendments are in effect, there will be no fiscal implications for state government and only potential immaterial fiscal implications for local governments participating in TMRS as a result of administering the amendment as proposed. The amendment to §127.4(c)(2)(C) clarifies the existing section and the amendment to §127.4(c)(2)(E) reflects existing practice; thus, these amendments would have no new fiscal implications. With respect to the proposed amendments regarding death while on military leave, the changes may affect the amount of benefit payable to the beneficiary or beneficiaries of an eligible member, and thus it is possible that the required contributions of a participating municipality could be affected. TMRS cannot estimate the additional costs, if any, for TMRS participating municipalities because whether or not there is any fiscal impact will vary from municipality to municipality and is dependent upon a number of different factors in any given situation. For example, whether there may be a fiscal impact on a TMRS participating municipality would depend, in part, on whether the municipality has employees who are TMRS members that leave employment for qualified military service, whether such members were vested or non-vested when they went on military leave, whether such members return to work for the municipality or die while performing qualified military services, whether the municipality pays military differential pay to such members, and the size of the municipality and the length of its vesting period. With respect to the proposed changes regarding military differential pay, while HEART Act requires that a tax-qualified plan be amended to expressly provide that military differential wage payment is treated as compensation for Internal Revenue Code purposes, the TMRS Act defines "compensation" for TMRS purposes. TMRS has historically interpreted its definition to include amounts considered as wages for income tax withholding purposes, including, without limitation, any military differential pay a city might pay the member, and thus this amendment would have no new fiscal implications.

Mr. Gavia also has determined that for each year of the first five years that the proposed amendment would be in effect the public benefit anticipated as a result of administering the proposed amendment would be: (i) more specificity as to the applicable rules for (I) making deposits for employee contributions missed while an eligible TMRS member was performing qualified military service, (II) the benefits available to the beneficiary of a TMRS member who leaves employment with a participating municipality for qualifying military service purposes and dies while performing such qualified military service, and (III) the treatment of military differential pay as compensation for TMRS and IRC purposes; and (ii) clarification that the section is intended to comply with, and will be construed to be consistent with, USERRA and IRC §401(a)(37) and §414(u).

Individuals who might be affected by the amendments are TMRS members who leave employment with a TMRS participating municipality for qualifying military service purposes. Mr. Gavia has determined that any economic cost to individuals required to comply with amended rule regarding making deposits for missed employee contributions already exists under TMRS' existing rules and practices and notes that any such deposits made by individuals are voluntary deposits. With respect to the proposed changes regarding death while on military leave, individuals affected by the proposed amendment might, under certain circumstances, realize an economic benefit in the form of additional death benefits available for their beneficiary. With respect to the proposed changes regarding military differential pay, any economic cost to individual members affected by the proposed amendments already exists because TMRS has historically interpreted the definition of compensation for TMRS purposes to include amounts considered as wages for income tax withholding purposes, including, without limitation, any military differential pay a municipality might pay a member. Mr. Gavia has determined that there will be no effect on a local economy because of the proposed amendments, and therefore no local employment impact statement is required under §2001.022 of the Texas Government Code. Mr. Gavia has also determined that there will be no direct adverse economic effect on small businesses or micro-businesses within TMRS' regulatory authority as a result of the proposed amendments;

therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under §2006.002 of the Texas Government Code.

Comments may be submitted in writing to Christine M. Sweeney, General Counsel, TMRS, P.O. Box 149153, Austin, Texas 78714-9153, faxed to (512) 225-3786, or submitted electronically to Ms. Sweeney at *csweeney@tmrs.com.* Written comments must be received by TMRS no later than 30 days from the date of publication of the proposed amendment in the *Texas Register.*

Statutory Authority: The amendments are proposed under Texas Government Code §853.506, which authorizes the Board to modify the terms of the TMRS Act for the purpose of compliance with USERRA; under Texas Government Code §855.607, which authorizes the Board to adopt rules that modify the plan to the extent the Board considers necessary for TMRS to be considered a tax-qualified plan; and under Texas Government Code §855.102, which grants the Board authority to adopt rules necessary or desirable for the efficient administration of the retirement system.

Cross-reference to Statutes: The proposed amendments implement (i) Texas Government Code §853.506, which provides that contributions, benefits, and service credits for qualified military service will be provided in accordance with IRC §414(u) and allows the Board to adopt rules that modify the terms of the TMRS Act for the purpose of compliance with USERRA; and (ii) Texas Government Code §855.607, which provides that the TMRS Act is to be construed and administered in a manner that the TMRS benefit plan will be considered a tax-qualified plan under IRC §401(a), and allows the Board to adopt rules that modify the plan to the extent the Board considers necessary for TMRS to be considered a qualified plan.

§127.4. Credited Service under the Uniformed Services Employment and Reemployment Rights Act.

(a) Definitions.

(1) Eligible Member--An employee of a participating municipality who is or would be considered to be employed in a position eligible for membership but who leaves employment with that municipality to perform service in the uniformed services; whose employer was notified of the obligation or intention of the employee to perform service in the uniformed services; who is released or discharged from such service on or after December 12, 1994, under honorable conditions; whose cumulative period of service in the uniformed services with respect to that participating municipality does not exceed five years not including periods excluded under 38 USC §4312(c); who applies for reemployment with that participating municipality within 90 days of release or discharge from the uniformed services, or after recovery from an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services (but such recovery period does not exceed two years); and who is reemployed by the participating municipality.

(2) Uniformed Services--The Armed Forces of the United States of America; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty; the commissioned corps of the Public Health Service; and any other category of persons designated by the President in time of war or national emergency.

(3) Service in the Uniformed Services--The performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, inactive duty for training, National Guard duty under Federal statute, and a period for which an employee is absent from a position of employment for the purpose of an examination of to determine the fitness of the employee to perform such duty.

(4) Participating Municipality--A municipality as defined in §851.001(9) of the Act (including entities having the status of a municipality under Government Code, §852.005 of the Act) that is participating in the Texas Municipal Retirement System at the time the eligible member leaves employment with the municipality to perform service in the uniformed services; or a municipality that is not participating in the System at the time the employee leaves employment with the municipality to perform service in the uniformed services but commences participating during the period of the employee's performance of duty in a uniformed service.

(b) Certification of Eligibility by Participating Municipality. An eligible member will be credited with current service in accordance with the Uniformed Services Employment and Reemployment Rights Act (the USERRA) (38 USC §4301 et seq.) upon certification by the participating municipality on forms provided by the system:

(1) that the eligible member's reemployment application is timely;

(2) that the eligible member has not exceeded the service limitations set forth in the USERRA;

(3) that the eligible member was not released or discharged from the uniformed service under other than honorable conditions;

(4) the period in which the eligible member performed service in the uniformed services;

(5) that the eligible member did not receive service credit for the period of uniformed service;

(6) the estimated compensation that the eligible member would have received from the municipality but for the period of service in the uniformed services; and

(7) the eligible member's date of reemployment with the participating municipality.

(c) Crediting of Current Service under the USERRA.

(1) An eligible member shall be credited with one month of current service credit for each month or part of a month in which:

(A) the eligible member performed service in the uniformed services; and

(B) a person who begins military service prior to the 16th day of a calendar month, or terminates military service after the 15th day of a calendar month is considered to have served a full month; and

(C) the participating municipality participated in the system.

(2) An eligible member may, but is not required to, deposit with the system any or all employee contributions that would have been deposited to his/her individual account for each period during which he/she performed service in the uniformed services if the eligible member had been employed with the participating municipality during the period of uniformed service. Deposits under this provision are subject to the following rules:

(A) The total deposits may not exceed the amount the eligible member would have been required to contribute had the eligible member remained continuously employed by the participating municipality throughout the period of service in the uniformed services.

(B) The compensation upon which allowable deposits will be calculated is the estimated compensation that the eligible member would have received from the participating municipality but for the period of service in the uniformed services.

(C) For purposes of determining the amount of current service credit and allowable monetary deposits [~~credit~~], months of uniformed service and estimated compensation shall be calculated from the later of the date the eligible member entered service in the uniformed services or the date the participating municipality commenced participation in the system.

(D) Within the allowable period for making deposits and subject to the maximum total amount of deposits, an eligible member may make deposits at any time and in any amount.

(E) Deposits must be paid directly to the system by the eligible member or by the rollover or transfer of funds in accordance with the provisions of §127.6 of this title (relating to Acceptance of Rollovers and Transfers). Optional deposits made under this section shall retain the same after-tax or pre-tax characterization that the funds have when deposited and[~~, will be treated as after-tax contributions, and~~] may not be returned until the member terminates from all covered employment in this system.

(F) Deposits will be allocated prospective interest only, and in the same manner as interest is allocated on member contributions to individual accounts.

(G) Deposits, when received by the system, shall be credited to the eligible person's individual account and shall be considered to be contributions attributable to the months of uniformed service performed beginning with the earliest month of uniformed service.

(H) For vesting and funding purposes, current service credit, and any monetary credit arising from voluntary deposits, shall be considered as having been earned through service with the reemploying municipality and as having been credited during the period of uniformed service.

(I) An eligible member receiving service credit for a specific month pursuant to §853.506 may not receive service credit for the same month under any other provision of the Act.

(J) Deposits must be made during a time period starting with the date of an eligible member's reemployment with the participating municipality and continuing for up to three (3) times the length of the member's immediate past period of uniformed service, with the repayment period not to exceed five (5) years. Deposits may be made only during this period and while the member is employed with the post-service reemploying municipality.

(d) Death While on Military Leave. Effective for deaths occurring on or after January 1, 2007, if a member dies while performing qualified military service, the beneficiaries of the member are entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service) provided under the Texas Municipal Retirement System tax-qualified pension plan as if the member had resumed employment and then died, in accordance with §401(a)(37) of the Internal Revenue Code. "Qualified military service" means any service in the uniformed service (as defined in Chapter 43 of Title 38 of the United States Code) by any individual if such individual is entitled to reemployment rights under such Chapter with respect to such service.

(e) Military Differential Pay. For purposes of the Texas Municipal Retirement System, prior to and on and after January 1, 2009, compensation as defined in §851.001(6) of the Act includes payments to an individual by a participating municipality who does not currently perform services for the participating municipality by reason of qualified military service as defined in subsection (d) of this section made in accordance with the participating municipality's current policy with regard to such qualified military service (hereafter referred to as "military differential pay"). For purposes of the Internal Revenue Code as it applies to the Texas Municipal Retirement System tax-qualified pension plan, effective January 1, 2009, a member receiving military differential pay shall be treated as an employee of the employer making the payment and the military differential pay shall be treated as compensation.

(f) Construction. This section is intended to comply with USERRA and Internal Revenue Code §401(a)(37) and §414(u) and shall be construed in a manner consistent with those provisions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2012.

TRD-201205362
David Gavia
Executive Director
Texas Municipal Retirement System
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 225-3754

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PART 10. TEXAS PUBLIC FINANCE AUTHORITY

CHAPTER 225. MASTER LEASE PURCHASE PROGRAM

34 TAC §225.7

The Texas Public Finance Authority (Authority) proposes an amendment to 34 TAC Chapter 225, §225.7, concerning the recovery of costs for the administration of the Master Lease Purchase Program (the Program). The proposed amendment provides that the Authority will calculate the pro rata reimbursement for each participating agency no more frequently than on a semiannual basis. Furthermore, the rule is subject to review for determining whether its reason for adoption continues to exist.

Susan K. Durso, General Counsel, has determined that for each year of the first five-year period the proposed amended section will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the rules. There will be no effect on local employment or the local economy as a result of the proposed rules.

Ms. Durso has determined that for each year of the first five-year period the amended section is in effect the public benefit anticipated as a result of the proposed sections will be that the Authority will be able to recoup its administrative expenses when needed, but not so frequently as to create unnecessarily frequent paperwork. There is no anticipated economic cost to persons who are required to comply with the rules. There is no anticipated difference in cost of compliance between micro, small, and large businesses and no anticipated economic cost for these entities.

Comments may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to Susan K. Durso, General Counsel, Texas Public Finance Authority, 300 W. 15th St., Room 411, Austin, Texas 78701 or by electronic mail to *susan.durso@tpfa.state.tx.us* with the words "Proposed Amendment 225.7" in the subject line. Comments should be presented in the order of the proposed rules. Comments not timely received or if submitted electronically without the words "Proposed Amendment 225.7" in the subject line may not be considered.

The amendment is proposed pursuant to Texas Government Code §1232.067, which authorizes the Texas Public Finance Authority's Board of Directors (Board) to adopt rules necessary for the Board to administer its functions and Government Code §1232.103 authorizing the Authority to sell obligations for the financing of a lease or other agreement for an executive or judicial branch state agency purchase or lease. Because the Authority continues to conduct the Program and will continue to collect an administrative fee from participating agencies, the Authority asserts that the reason for adoption of the rule continues to exist.

The section affects Texas Government Code §1232.103.

§225.7. Recovery of Costs.

(a) The authority may recover its administrative costs by assessing each client agency on a pro rata basis for reimbursement of administrative costs. This pro rata reimbursement shall be calculated no more frequently than semiannually [~~on an annual basis~~] to cover the ongoing costs of the program. The exact amount assessed each client agency shall be separately disclosed on the debit memo to be submitted to each client agency at least one month in advance of collection. In no event shall administrative costs assessed each client agency exceed 1 1/2% per annum of their pro rata participation in the program.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 9, 2012.

TRD-201205260
Susan Durso
General Counsel
Texas Public Finance Authority
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 463-3143

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 807. CAREER SCHOOLS AND COLLEGES

SUBCHAPTER S. SANCTIONS

40 TAC §807.353

The Texas Workforce Commission (Commission) proposes amendments to the following section of Chapter 807, relating to Career Schools and Colleges:

Subchapter S, Sanctions, §807.353

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

PART III. IMPACT STATEMENTS

PART IV. COORDINATION ACTIVITIES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

Texas law charges the Commission with exercising jurisdiction and control of the oversight of career schools and colleges operating in Texas. The Commission's Career Schools and Colleges department (department) licenses and regulates most private postsecondary career schools and colleges that offer vocational training or continuing education to Texas residents. In Texas, in the five years between Fiscal Year 2007 (FY'07) and FY'12, the number of licensed career schools and colleges has grown 27 percent and the number of students enrolled has increased 21 percent. Consequently, the Commission currently regulates more than 500 career schools and colleges that provide vocational training to more than 160,000 students annually.

Texas law requires the Commission to administer the provisions of Texas Education Code, Chapter 132; enforce minimum standards for approval and regulation of career schools and colleges; and adopt policies and rules necessary for carrying out the responsibilities of Chapter 132. To fulfill this role, the department investigates complaints about schools, monitors schools to ensure regulatory compliance, arranges for the disposition of students affected by a school closure, and administers the Tuition Trust Account to pay tuition refunds to students when a school closes. In carrying out its regulatory duties, the department seeks to:

--hold that all businesses meeting the definition as a career school or college meet consistent standards of quality, performance, and regulatory oversight;

--provide consumer protection for Texas students; and

--ensure students receive quality training to meet the needs of Texas employers.

To support the department's ability to effectively and efficiently promote consistent standards of quality that are sufficient to meet the training needs of Texas employers by career schools and colleges regulated by the Commission, the Chapter 807 amendments clarify:

--the consequences for repeat violations of requirements by specifying the sanctions to be applied for repeat violations;

--the relationship of rules to statutory guidance;

--the calculation of penalties; and

--the definition of a repeat violation.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER S. SANCTIONS

The Commission proposes the following amendments to Subchapter S:

§807.353. Administrative Penalties.

Texas Education Code §132.152 authorizes the Commission to assess an administrative penalty in an amount not to exceed $1,000 and requires the Commission to consider the seriousness of the violation in determining the amount of the penalty.

Section 807.353(a) simplifies the relationship of rule language to statutory direction on maximum penalty amounts by clarifying that an administrative penalty "shall not exceed the amount specified in Texas Education Code §132.152" for each instance of a violation and "shall be assessed in accordance with that section."

Section 807.353(b), which states that regardless of the penalty amount for a particular violation contained in the penalty matrix, the administrative penalty for repeat violations shall be up to the maximum penalty amount of $1,000 per violation, is removed.

New §807.353(b) clarifies the calculation for an administrative penalty as "based on a penalty dollar amount and the number of instances of a violation."

New §807.353(c) more clearly defines a repeat violation by stating that "a violation is considered a repeat violation only where notice of a violation or an administrative penalty has been issued previously for that same violation."

As already provided in §807.353(d), assessment of penalties for repeat violations of specific requirements does not prevent the Agency from imposing additional penalties or other sanctions for violations of requirements of statute or rule. As set out in Texas Education Code §132.055, career schools and colleges are expected to maintain the standards of their certificates and ensure that the programs, curriculum, and instruction are of such quality, content, and length to reasonably and adequately achieve the stated objective for which the programs, curriculum, and instruction is offered. Multiple or repeat violations of rule or statute can jeopardize the ability of a career school or college to maintain these standards. In such instances, graduated penalties may be assessed with other sanctions up to and including certificate denial or revocation.

In the Chapter 807 amendments, adopted in January 2012, the Commission established a penalty matrix to set forth amounts for violations of career schools and colleges statutes and rules, based on the seriousness of the violation and potential harm to consumers, up to the $1,000 statutory cap. However, the penalty matrix did not differentiate penalty amounts on the basis of repeat findings of the same violations.

Section 807.353(e), which introduces the penalty matrix, simplifies language to state that the matrix is for determining and assessing an administrative penalty. To provide clear deterrence for repeated failure to comply with statutory and regulatory requirements, the Commission proposes to amend the matrix to include graduated penalties that will be levied for repeat violations of specific statutory and regulatory requirements. Further, wording for some of the violations identified is revised to provide clarification on violations and how they are assessed.

Pending adoption of the rule, the department shall continue to operate consistent with the Commission's authority to establish sanctions for repeat violations up to the statutory maximum of $1,000. It is the Commission's intent to implement sanctions for repeat violations in accordance with the penalty matrix set forth in §807.353 for any penalties levied on or after December 1, 2012.

Certain subsections in this section have been relettered to accommodate additions and deletions.

PART III. IMPACT STATEMENTS

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rule will be in effect, the following statements will apply:

There are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rule.

There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There are no foreseeable implications relating to the costs or revenues of the state or local governments as a result of enforcing or administering the rule.

There are no significant, probable economic costs to persons required to comply with the rule.

There is no anticipated adverse economic impact on small or microbusinesses as a result of enforcing or administering the rule.

Economic Impact Statement and Regulatory Flexibility Analysis

The Agency has determined that the proposed rule will not have an adverse economic impact on small businesses as the proposed rule places no requirements on small businesses.

Richard C. Froeschle, Director of Labor Market and Career Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rule.

Reagan Miller, Director, Workforce Development Division, has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to clarify regulatory requirements and consequences for repeat violations for career schools and colleges, to clarify regulatory requirements for career schools and colleges, and assist the Agency to exercise its regulatory authority as efficiently as possible.

The Agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the Agency's legal authority to adopt.

PART IV. COORDINATION ACTIVITIES

Comments on the proposed rule may be submitted to TWC Policy Comments, Workforce Policy and Service Delivery, attn: Workforce Editing, 101 East 15th Street, Room 440T, Austin, Texas 78778; faxed to (512) 475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us. The Commission must receive comments postmarked no later than 30 days from the date this proposal is published in the *Texas Register*.

The rule is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rule affects Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

§807.353. Administrative Penalties.

(a) An [~~Unless otherwise provided by statute, an~~] administrative penalty shall not exceed the amount specified in Texas Education Code §132.152 [~~$1,000~~] for each instance of a violation and shall be assessed in accordance with that section.

[~~(b) Regardless of the penalty amount for a particular violation contained in the penalty matrix, the administrative penalty for repeat violations shall be up to the maximum penalty amount of $1,000 per violation.~~]

(b) [~~(c)~~] The [~~total amount of an~~] administrative penalty is [~~shall be~~] calculated based on a [~~as the product of the~~] penalty dollar amount and the number of instances of violation.

(c) A violation is considered a repeat violation only where notice of a violation or an administrative penalty has been issued previously for that same violation.

(d) The assessment of an administrative penalty shall not preclude the Agency from administering other sanctions, up to and including revocation of a school's certificate of approval.

(e) The following penalty matrix is for [~~For the purposes of~~] determining and assessing an administrative penalty[~~, the Agency shall use the penalty matrix below~~]. The absence of a particular violation from the matrix shall not preclude the Agency from assessing an administrative penalty.

Figure: 40 TAC §807.353(e)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 9, 2012.

TRD-201205250
Laurie Biscoe
Deputy Director, Workforce Programs
Texas Workforce Commission
Earliest possible date of adoption: November 25, 2012
For further information, please call: (512) 475-0829

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 1. ADMINISTRATION

PART 12. COMMISSION ON STATE EMERGENCY COMMUNICATIONS

CHAPTER 252. ADMINISTRATION

1 TAC §252.7

The Commission on State Emergency Communications withdraws the proposed amendment to §252.7 which appeared in the May 25, 2012, issue of the *Texas Register* (37 TexReg 3773).

Filed with the Office of the Secretary of State on October 10, 2012.

TRD-201205289
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Effective date: October 10, 2012
For further information, please call: (512) 305-6930

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 3. ADMINISTRATIVE RESPONSIBILITIES OF STATE FACILITIES

SUBCHAPTER E. DEATH OF AN INDIVIDUAL

40 TAC §3.507

The Department of Aging and Disability Services withdraws the proposed new §3.507 which appeared in the April 13, 2012, issue of the *Texas Register* (37 TexReg 2539).

Filed with the Office of the Secretary of State on October 9, 2012.

TRD-201205244
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: October 9, 2012
For further information, please call: (512) 438-4162

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Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 12. COMMISSION ON STATE EMERGENCY COMMUNICATIONS

CHAPTER 251. REGIONAL PLANS--STANDARDS

1 TAC §251.14

The Commission on State Emergency Communications (CSEC) adopts new §251.14, concerning the minimum requirements for VoIP Positioning Center Operators (VPCs) providing or facilitating the providing of 9-1-1 service using a dynamic Automatic Location Identification (ALI) solution. The new section is adopted with changes to the proposed text as published in the August 17, 2012, issue of the *Texas Register* (37 TexReg 6191). CSEC has determined that the adopted changes to the proposed text do not (1) change the nature or scope of the rule so much that it could be deemed a different rule; (2) affect individuals who would not have been impacted by the rule as proposed; or (3) impose more stringent requirements for compliance.

REASONED JUSTIFICATION

New §251.14 is justified in order to establish minimum requirements for VPCs in providing 9-1-1 service to the end-users of its Internet Protocol (VoIP) service provider customers (VSPs). The minimum requirements are intended to ensure that the provisioning of 9-1-1 service by VPCs is provided in a consistent manner and without a degradation in 9-1-1 service for customers formerly utilizing the fixed-ALI solution. The new section is consistent with National Emergency Number Association (NENA) Interim VoIP Architecture for Enhanced 9-1-1 Services. Additionally, the requirements serve to negate any competitive advantage to be gained by a VPC offering a level of 9-1-1 service less than that required by the new section.

In 2005 the Federal Communications Commission (FCC) adopted regulations requiring interconnected voice over Internet Protocol (VoIP) service providers (VSPs) to provide enhanced 9-1-1 service to their customers. In 2008, Congress passed the New and Emerging Technologies 911 Improvement Act of 2008 (NET 911 Act), which provides in part:

It shall be the duty of each IP-enabled voice service provider to provide 9-1-1 service and enhanced 9-1-1 service to its subscribers in accordance with the requirements of the Federal Communications Commission, as in effect on the date of enactment of the New and Emerging Technologies 911 Improvement Act of 2008 and as such requirements may be modified by the Commission from time to time. (Codified at 47 U.S.C. §615a-1.)

VPCs offer a critical service to VSPs in providing 9-1-1 service to VSP end-users. VPCs are not VSPs and they are currently not required to register or be certificated by the FCC, the Texas Public Utility Commission (PUC), CSEC, or a 9-1-1 Entity. A VPC's ability to provide service is predicated on the cooperation of Texas' 9-1-1 Entities (Regional Planning Commissions [RPCs] and Emergency Communication Districts), particularly in providing access to the 9-1-1 Entities' 9-1-1 networks.

In response to submitted comments, discussed below, CSEC adopts new §251.14 with the following changes to the published text:

Subsection (g)(1)(C): To the beginning of the text added "use the correct ESQK pool in order to enable displaying" and deleted the word "display".

Subsection (g)(4): Added "provided by its VSP and" between the words "code" and "used" in the first sentence, and replaced the ";" with a ".". Added the following second sentence: "The foregoing requires VPC Operator to request from its VSP customers that they convey the correct COS codes for the VSPs' end-users;".

Subsection (h): In the first sentence changed "resolve" to "address" and deleted "and provide written notice of the correction to the notifying 9-1-1 Entity." Added before the period in the second sentence "and provide written notice to the notifying 9-1-1 Entity".

Subsection (j): In the first sentence added "notify in writing its customer and the 9-1-1 Entity when conversion from the static protocol is complete to enable the VSP to initiate removal of all affected static records from the 9-1-1 Database." before the word "ensure", deleted the remainder of the subsection which read "ensure that such records are promptly unlocked and delete upon conversion to the dynamic ALI solution. A VSP shall provide written notice to all affected 9-1-1 Entities upon removal of the static records."

Subsection (k): In the first sentence, deleted "Applicable Law, including", added "described by that section or timely forward the request to all affected VSPs and provide notice to the Commission or the requesting 9-1-1 Entity" after the word "information", and deleted from the word "regarding" to the word "end-users". In the second sentence, deleted "9-1-1 Entity's", added "47 U.S.C. §222(g) and" after the word "with", deleted "Applicable Law, including".

Subsection (l) is deleted in its entirety.

Comments: CSEC received initial comments on proposed §251.14 from Intrado, Inc. (Intrado), Texas 9-1-1 Alliance (the Alliance), TeleCommunications Systems, Inc. (TCS), and Verizon; and reply comments from the Alliance, TCS, and the Texas Cable Association (TCA).

Initial Comments: A few commenters challenged CSEC's authority under state and federal law to adopt §251.14. The com-

menters argue that CSEC is preempted by federal law and precluded by state law from directly or indirectly regulating terms or conditions for VoIP service. As summarized by Verizon, CSEC "may not regulate indirectly what it may not regulate directly." Moreover, the Federal Communications Commission (FCC) has not delegated to the states, and thus CSEC, authority to enforce its VoIP 9-1-1 regulations. Intrado added that CSEC's jurisdictional authority is limited to "9-1-1 Entities, not over service providers" and therefore its rulemaking efforts must be directed at 9-1-1 Entities.

In support of their preemption/preclusion argument, the commenters cite the federal New and Emerging Technologies 911 Improvement Act of 2008, Pub. L. 110-283, 122 Stat. 2620 (the 2008 NET 9-1-1 Act), the FCC's Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order, 19 FCC Red 22404 (2004) (Vonage Order), and Texas Public Utility Regulatory Act (PURA) §52.002(d). Those commenting in opposition to the rule generally recommended that CSEC look to achieve its objectives through contractual and other consensus-based arrangements or via rules directed at the 9-1-1 Entities.

Commenting specifically on the text of the published rule, Intrado provided that:

(1) the rule does not allow for the providing of dynamic ALI solutions to entities that are not VSPs, such as Video Relay Service (VRS) providers;

(2) A VPC's providing of Class of Service (COS) code on each 9-1-1 call is dependent upon such code being provided to it by the underlying VSP;

(3) the obligation for VPCs to provide "records and information regarding its VSP customers' end-users" could be precluded by contract or confidentiality laws;

(4) the requirement to "resolve" MSAG and ALI discrepancies within three business days should be changed to "address" or allow for best efforts to resolve within the stated time;

(5) the requirement for unlocking and deleting static 9-1-1 records from the 9-1-1 Database is misleading and should be modified from a VPC requirement to an obligation to inform their VSP customers when it is appropriate for them to delete static 9-1-1 records;

(6) the provision regarding the providing of "records and information" under 47 U.S.C. §222(g) is overly broad, and any such end-user information sought by a 9-1-1 Entity should be requested from VSPs with appropriate reimbursement. Alternatively, Intrado urges that the section be changed to reflect the need for authorization by VSPs for release of the data and cost recovery to the VPC in lieu of cost recovery for the VSP; and

(7) the compliance provision is "harsh and not supported by authority," denies VPCs due process; and provides no means of ensuring competitive neutrality before losing important rights.

Intrado also commented that the rule does not provide an effective date for the rule, i.e., date by which a VPC must be registered and in compliance with the new section; should include from the strawman rule specified obligations imposed on 9-1-1 Entities; and that the new section does not address the status of agreements executed by VPCs with CSEC 9-1-1 Entities.

TCS commented that the requirement that VPCs be registered before they can obtain 9-1-1 Entity approval to obtain pseudo automatic number identifications (pANIs) is contrary to the FCC's requirement of state certification. TCS also commented similarly to Intrado regarding the COS and resolution of discrepancy requirements.

The Alliance supports adoption of the new section, arguing that it neither directly nor indirectly conflicts with state or federal law. According to the Alliance, the new section "simply address[es] the administration of processes associated with" laws and regulations governing 9-1-1 when utilizing the services of VPCs. For example, the Alliance asserts that the records and information requirement addresses the "preferable logistical processes for obtaining VoIP data from the VPCs that is already required to be provided under federal statute 47 U.S.C. §222(g)."

The Alliance commented that the new section is:

[C]onsistent with and furthers statutes and regulations associated with 9-1-1 emergency service and because it facilitates ensuring "a consistent and accurate level of 9-1-1 service" by clarifying VPC expected standard processes, authorizations, and approvals consistent with parity, non-discrimination, and non-degradation of service for delivery of 9-1-1 calls and 9-1-1 data to PSAPs.

The Alliance favorably compares the new section with CSEC §251.10, Guidelines for Implementing Wireless E9-1-1 Service, governing the provision of 9-1-1 service by wireless service providers.

The Alliance counters the anticipated jurisdictional and authority arguments as ignoring the FCC's mandate that 9-1-1 Entities provide VSPs, or their VPC-agents, access to capabilities that the 9-1-1 Entities "own or control." Providing such access to 9-1-1 networks requires cooperation between the 9-1-1 Entities and the VPCs. The VPCs play an "overwhelmingly material part in working cooperatively with the 9-1-1 entities to ensure that 9-1-1 service works in a consistent and accurate manner."

Regarding state law, the Alliance asserts that the express language of PURA §52.002(d) does not prohibit the adoption of administrative standards associated with providing 9-1-1 service; and is consistent with the actions taken by the Public Utility Commission (PUC) to implement §52.002(d). Moreover, the statement of legislative intent to bill amending §52.002(d) provides that:

Nothing in Senate Bill 980 limits or impairs the authority of any department, agency, or political subdivision to administer or enforce any statutory obligation or fee with regard to the regulation or provisioning of E9-1-1 services or next generation E9-1-1 services.

The Alliance also urges the deletion of the subsection on Compliance, preferring instead to continue relying on the ad hoc approach to address compliance matters. The Alliance proposes clarifying modifications to the subsections regarding English Language Translations; MSAG validation and ALI Discrepancies; Conversion and Deletion of Static 9-1-1 ALI Records; and Records and Information.

Reply Comments: TCS commented in reply that no persuasive arguments have been made as to why the rule is necessary over the current voluntary arrangements; offered additional support for its objection to the registration requirement; and reiterated its and other commenters' assertion that CSEC lacks jurisdiction over VPCs. TCS urges CSEC to table the rule and continue "its successful management of 9-1-1 as it has done in the past

through patient and thoughtful leadership of the VSPs and VPCs in Texas."

TCA submitted reply comments to correct the Alliance's representations regarding the testimony given by Time Warner Cable before the Texas Senate. TCA acknowledges the testimony, but clarified that it was not in support of 9-1-1 minimum standards but rather highlighted the potential need for regulatory oversight of ILECs despite the deregulation of their retail services. The discussion of 9-1-1 service was to provide context and an example of the potential need for regulatory oversight of deregulated ILECs.

The Alliance commented in reply its general acceptance of the changes proposed by TCS and Intrado. The Alliance partly disagrees with Intrado regarding subsection (k) and recommends that the VPC provide the requested information to the extent it is an agent of its VSP customer or, alternatively, refer the request to its VSP customer(s) with notice to the affected 9-1-1 Entities.

CSEC Response:

CSEC disagrees with the comments that CSEC is preempted and precluded by federal and state law, respectively, from adopting the new section. The NET 911 Act requires service provider parity for VSPs equivalent to that afforded local exchange companies. Section 615a-1(a) of the NET 911 Act imposes a duty on VSPs to provide 9-1-1 service and enhanced 9-1-1 service. Enhanced 9-1-1 service is defined in the NET 911 Act as "the delivery of 9-1-1 calls with automatic number identification and automatic location identification, or successor or equivalent information features over the wireline E911 network . . . and equivalent or successor networks and technologies."

Additionally, §615a-1(b) obligates the 9-1-1 Entities to provide VSPs access to the facilities that the 9-1-1 Entities own or control that are utilized in the providing of 9-1-1 service. Such obligation is extended to VPCs as the third-party agents of VSPs. Minimum requirements are necessary in order to provide non-discriminatory and competitively neutral access to the agents of VSPs to provide parity with that afforded wireless service providers (WSPs). CSEC §251.10 is similar to §251.14 and is applicable to WSPs in implementing and providing 9-1-1 service. Finally, §615a-1(d) provides that:

Nothing in this section is intended to alter the authority of State commissions or other State or local agencies with jurisdiction over emergency communications, provided that the exercise of such authority is not inconsistent with Federal law or Commission requirements.

Section 251.14 imposes minimum requirements on the agents of VSPs to provide a standard level of enhanced 9-1-1 service to all its VSP customers' end-users. Section 251.14 provides for 9-1-1 service and service provider parity and is consistent with federal law and federal requirements. Accordingly, CSEC is not preempted from adopting the new section.

Regarding the comments about state law, the Texas Legislature's adding of PURA §52.002(d) includes the statement of legislative intent:

Nothing in [§52.002(d)] limits or impairs the authority of any department, agency, or political subdivision to administer or enforce any statutory obligation or fee with regard to the regulation or provisioning of E9-1-1 services or next generation E9-1-1 services.

The new section gives effect to the stated legislative intent and is critical to providing a standard level of enhanced 9-1-1 service by VPCs. The providing of 9-1-1 service is migrating inexorably toward an exclusive Internet Protocol (IP)-based environment. The promises of Next Generation 9-1-1 Service, including text-to-911, cannot be achieved without clear standards governing service delivery. Rather than precluding adoption of the new section, state law continues to authorize CSEC to administer statutory obligations regarding 9-1-1 service.

CSEC disagrees with including in the rule obligations of 9-1-1 Entities (the RPCs). By its terms, the rule is specifically directed at and limited to VPCs. Regarding COS codes, the requirement that a VPC request and provide such codes is contingent upon a 9-1-1 Entity being able to utilize COS codes. Regarding MSAGs and routing information, the 9-1-1 Entities routinely provide such information on a non-discriminatory basis to service providers, including VPCs.

Regarding the applicability of the section to a VPC's non-VSP customers such as Video Relay Service providers, the section is limited by its terms to VPCs with respect to the provisioning of 9-1-1 service for its VSP customers' end-users. CSEC makes no change to the published text on account of this comment.

Regarding TCS' comment on the requirement to register prior to obtaining pANIs, the end of subsection (c) provides "as applicable." Accordingly, if the pANI numbering administrator does not require 9-1-1 permission before distributing pANIs, lack of registration will not preclude a VPC from obtaining pANIs. CSEC makes no change to the published text on account of this comment. Additionally, CSEC's deleting of subsection (l) regarding compliance further vitiates TCS' concerns regarding its ability and authority to obtain pANI records absent registration.

CSEC agrees with the comments regarding the providing of COS codes; addressing MSAG Validation and ALI Discrepancies; deletion of static 9-1-1 ALI Records; the providing of Records and Information subject to the disclosure requirements of 47 U.S.C. §222(g); and the subsection on Compliance. CSEC adopts the rule with changes to the foregoing subsections addressing the comments, including the deletion of the subsection on Compliance.

CSEC further agrees with the request for providing an effective date for the rule and addressing existing agreements.

EFFECTIVE DATE

The effective date of the new section is May 1, 2013. As of the effective date, any agreements between a VPC and CSEC or an RPC are void and of no further effect.

STATEMENT OF AUTHORITY

The new section is adopted pursuant to Health and Safety Code §771.051 and §771.055; 47 U.S.C. §615a-1 and §615b; 47 C.F.R. §§9.1 - 9.7; H.J. of Tex., 82nd Leg., R.S. 2817 (2011).

No other statute, article, or code is affected by the adoption.

§251.14. VoIP Positioning Center Operator Minimum Requirements.

(a) Purpose. The purpose of this rule is to establish minimum requirements for VoIP Positioning Center (VPC) Operators providing or facilitating the providing of 9-1-1 service using a dynamic Automatic Location Identification (ALI) solution. This rule is intended to provide the end-users of IP-enabled voice service providers (VSPs) with a consistent level of 9-1-1 service that is more comparable to wireline E9-1-1 service.

(b) Applicability. This rule is applicable to VPC Operators providing or facilitating the providing of 9-1-1 service to VSP end-

users whose voice service is either fixed or nomadic, but non-mobile. Nomadic service is service that an end-user can access from any broadband connection. This rule provides the minimum standards for a VPC Operator to implement 9-1-1 service requirements.

(c) Registration. A VPC Operator shall register with the Commission and provide written notice to each 9-1-1 Entity in whose region or territory they provide VPC service. Registration is a prerequisite to accessing a 9-1-1 Entity's Network and 9-1-1 Database, for obtaining 9-1-1 Entity approval to obtain pseudo automatic number identifications (pANIs), and for accessing dedicated 9-1-1 trunking, as applicable. Registration shall be made on a form provided by Commission staff and includes:

(1) VPC Operator name;

(2) Services provided;

(3) Name of 9-1-1 Entity in whose region or territory the VPC Operator provides service;

(4) Name and contact information of its VSP customers;

(5) Whether the VPC Operator collects or remits 9-1-1 service fees on behalf of any of its VSP customers' end-users.

(d) Service Plan. A VPC Operator shall submit to the Commission a service plan consisting of the pANIs obtained from the North America Numbering Plan Administrator and the Emergency Service Number (ESN) assignment associated with each pANI.

(e) Certification. A VPC Operator shall annually, and upon request by the Commission or a 9-1-1 Entity, update and certify the accuracy of its registration information.

(f) Coordination with 9-1-1 Entity. Upon request from the Commission or a 9-1-1 Entity in whose region or territory a VPC Operator provides service, the VPC Operator shall coordinate with the Commission or requesting 9-1-1 Entity to ensure compliance with this rule and the proper provisioning of 9-1-1 service.

(g) VPC Operator Minimum Requirements in Providing 9-1-1 Service. A VPC Operator shall:

(1) use the current Master Street and Address Guide (MSAG) of each 9-1-1 Entity in whose region or territory the Operator provides 9-1-1 service to:

(A) validate end-user ALI;

(B) assign wireline ESNs from Emergency Services Query Key (ESQK) pools created for such purpose; and

(C) use the correct ESQK pool in order to enable displaying valid English Language Translations (ELTs) matching the assigned wireline ESN;

(2) accept delta MSAG files in a manner consistent with the standard current format of initial MSAG files to maintain the MSAG for near real-time validation purposes;

(3) provide a pANI shell record containing the Automatic Number Information (ANI) and ALI associated with the 9-1-1 call;

(4) provide the equivalent of MSAG-validated routing with associated wireline ESN, including the appropriate National Emergency Number Association (NENA) Class of Service (COS) code provided by its VSP and used by the 9-1-1 Entity in its region or territory. The foregoing requires VPC Operator to request from its VSP customers that they convey the correct COS codes for the VSPs' end-users;

(5) provide its VSP customer's NENA Company ID in the Company ID field in the ALI record associated with each 9-1-1 call. VPC Operator's NENA Company ID should be identified by the pANI. In areas where the 9-1-1 Database supports using two NENA Company IDs, the two Company IDs shall be populated as provided in NENA standard 02-010; and

(6) not use fictitious data in the pANI shell record associated with each 9-1-1 call.

(h) MSAG validation and ALI Discrepancies. A VPC Operator shall address MSAG validation errors and ALI discrepancies within three (3) business days of notification by a 9-1-1 Entity. A VPC Operator shall verify that referred MSAG validation and ALI discrepancies have been resolved and provide written notice to the notifying 9-1-1 Entity.

(1) A VPC shall obtain prior approval from the notifying 9-1-1 Entity before resolving a validation or discrepancy using an address translation or alias. A notifying 9-1-1 Entity shall use its best efforts to approve/deny requests for translations or aliases within three (3) business days of receipt of a request from a VPC Operator.

(2) A VPC shall refer questions about a 9-1-1 Entity's MSAG to the appropriate 9-1-1 Entity. If the VPC Operator does not receive a response within three (3) business days, it shall escalate the issue to the 9-1-1 Entity or a representative of the appropriate MSAG authority.

(i) ESQKs. Upon request from a 9-1-1 Entity, a VPC Operator will provide a listing of ESQKs used in the requesting 9-1-1 Entity's region or territory and a description of the standard period of aging and re-use cycle of ESQKs (e.g., how long ESQK information for the 9-1-1 call remains visible for call transfers).

(j) Conversion and Deletion of Static 9-1-1 ALI Records. A VPC Operator whose VSP customer has static 9-1-1 ALI records in the 9-1-1 Database shall notify in writing its customer and the 9-1-1 Entity when conversion from the static protocol is complete to enable the VSP to initiate removal of all affected static records from the 9-1-1 Database.

(k) Records and Information. To the extent permitted by 47 U.S.C. §222(g), a VPC Operator will, upon request from the Commission or a 9-1-1 Entity, provide records and information described by that section or timely forward the request to all affected VSPs and provide notice to the Commission or the requesting 9-1-1 Entity. Records and information submitted in response to a request shall be kept confidential in accordance with 47 U.S.C. §222(g) and Health and Safety Code §771.061, and used for purposes of enhancing the provisioning of 9-1-1 service or emergency notification service.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 10, 2012.

TRD-201205282
Patrick Tyler
General Counsel
Commission on State Emergency Communications
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Proposal publication date: August 17, 2012
For further information, please call: (512) 305-6930

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER D. TEXAS HEALTHCARE TRANSFORMATION AND QUALITY IMPROVEMENT PROGRAM

The Texas Health and Human Services Commission (HHSC) adopts new §§354.1601, 354.1602, 354.1611 - 354.1613, 354.1621, 354.1622, and 354.1631 - 354.1634, concerning the Texas Healthcare Transformation and Quality Improvement Program. New §§354.1601, 354.1602, 354.1611 - 354.1613, 354.1621, 354.1631 - 354.1634 are adopted with changes to the proposed text as published in the August 24, 2012, issue of the *Texas Register* (37 TexReg 6401) and will be republished. New §354.1622 is adopted without changes to the proposed text as published in the August 24, 2012, issue of the *Texas Register* (37 TexReg 6401) and will not be republished.

Background and Justification

The Texas Legislature, through the 2012-2013 General Appropriations Act (H.B. 1, 82nd Legislature, Regular Session, 2011) and Senate Bill (S.B.) 7, 82nd Legislature, First Called Session, 2011, instructed HHSC to expand its use of Medicaid managed care to achieve program savings. The Legislature also directed HHSC to preserve federal hospital funding historically received as supplemental payments under the Upper Payment Limit (UPL) program to make up the difference between what Medicaid pays for a service and what Medicare would pay for the same service.

Funding from local governmental entities has historically comprised the non-federal share of UPL payments under Texas' approved Medicaid State Plan. In a managed care context, however, the Centers for Medicare and Medicaid Services (CMS) has interpreted 42 CFR §438.60 to prohibit UPL payments to providers. Therefore, CMS instructed HHSC that the mechanism the state must employ to continue the use of local funding to support supplemental payments to providers in a managed care environment is a waiver of the Medicaid State Plan as provided by §1115 of the Social Security Act (42 U.S.C. §1315).

In accordance with legislative and CMS direction, HHSC submitted a proposal to CMS for a five-year §1115 demonstration waiver designed to build on existing Texas health care reforms and to redesign health care delivery in Texas consistent with CMS goals to improve the experience of care, improve the health of populations, and reduce the cost of health care without compromising quality. CMS approved the Texas Healthcare Transformation and Quality Improvement Program §1115 demonstration waiver (the waiver) on December 12, 2011. The waiver preserves hospital funding, provides incentive payments for health care improvements, and directs more funding to hospitals that serve large numbers of uninsured patients. The waiver includes two funding pools: the Uncompensated Care (UC) and the Delivery System Reform Incentive Payment (DSRIP) pools.

UC pool payments are designed to help offset the costs of uncompensated care provided by a hospital or other Medicaid providers.

DSRIP pool payments are new incentive payments to hospitals and other Medicaid providers that develop programs or strategies to enhance access to health care, the quality of care, and the health of the patients and families served.

To receive UC payments or DSRIP under the waiver, hospitals and other Medicaid providers must participate in a regional healthcare partnership (RHP). (Requirements for hospitals and physician practice plans to receive UC payments are also included in HHSC rules (1 TAC §355.8201 and §355.8202).) RHP participants will include governmental entities providing public funds, Medicaid providers, and other stakeholders. Participants will develop a regional plan (an "RHP plan") for their RHP. The RHP plan will identify participants, regional health care needs, proposed projects, and funding. Each RHP must have one entity (an "anchor") to serve as HHSC's primary point of contact in the region and to facilitate regional stakeholder involvement.

The new rules are adopted to describe the composition and organization of RHPs; the criteria, responsibilities, and limitations of an RHP's anchor; the role of the RHP participants, including IGT entities, Medicaid providers, and other stakeholders; the required elements of an RHP plan; HHSC's notification procedure after reviewing an RHP plan; the procedure an anchor must follow in response to a request from HHSC to provide additional information or to modify the plan; DSRIP categories and requirements on RHPs and individual performers; and the allocation of the DSRIP pool and valuation of DSRIP projects.

HHSC developed the adopted rules in accordance with the special terms and conditions of the waiver, the Program Funding and Mechanics Protocol (PFM Protocol), the RHP Planning Protocol, guidance from CMS, and in consultation with waiver stakeholders. Waiver stakeholders have been closely involved in the creation of this program and had extensive opportunity to comment on the program's structure. During the creation of the RHPs, HHSC staff requested that IGT entities complete a survey regarding a preliminary map created by HHSC, requested public feedback on a new map that was based on the survey, and held a public hearing on yet a third map. During the negotiations regarding the PFM Protocol, HHSC sought public comment on two different versions (one of those versions largely mirrored the proposed rules). In addition, HHSC has continuously operated an email address dedicated to receiving feedback and questions regarding waiver developments.

Comments

The 30-day comment period ended on September 23, 2012. Additionally, on September 18, 2012, HHSC held a public hearing to receive comments on the proposed rules. HHSC received comments from the Texas Hospital Association, South Texas Health System, the Texas Association of Community Health Centers, Nueces County Hospital District, Doctor's Hospital at Renaissance, Knapp Medical Center, Mission Regional Medical Center, Doctors Hospital of Laredo, and the Center for Public Policy Priorities. Summaries of each comment and HHSC's responses follow.

Comment: A commenter requested that HHSC include specific language authorizing performers to hire subcontractors in the course of DSRIP project performance.

Response: HHSC recognizes the importance of subcontractors to the success of the §1115 waiver. However, HHSC disagrees with the commenter that there is a need to specifically authorize the ability to subcontract under the waiver. There is no provision in the final rules that prevents a performer from subcontracting

with any other entity to aid in the planning, implementation, or operation of a DSRIP project. HHSC did not change the rules in response to this comment.

Comment: A commenter requested that HHSC define physician practice groups, specifically as it relates to §354.1634(f)(2).

Response: HHSC agrees with the comment and included a definition of "physician group practice" in the final rule.

Comment: A commenter requested that HHSC expand the requirement in §354.1621(b)(9) that an RHP Plan include a list of DSRIP projects not selected for performance to further require an explanation as to why a DSRIP project was not selected.

Response: HHSC believes that an RHP is in the best position to know which projects are most appropriate for the region. HHSC has specified certain minimum requirements for RHPs and will approve and submit to CMS for review RHP plans that meet these minimum requirements. HHSC disagrees with commenter's request to require explanations for DSRIP projects that are not selected for inclusion in the RHP plan. HHSC did not change the rules in response to this comment.

Comment: Multiple commenters requested that HHSC consider the difficulties that an RHP could have in meeting the DSRIP requirements of §354.1632(a)(4) and §354.1634(d) if the RHP does not have a significant government hospital presence. These commenters propose alternative remedies. First, notwithstanding the agreement embodied by the PFM Protocol, commenters propose allowing Local Mental Health Authorities (LMHAs) to be considered hospitals solely for the purpose of fulfilling the DSRIP minimum project and private hospital participation requirements. In the alternative, commenters propose that HHSC grant Tier 4 RHPs without a significant government hospital presence "substantial flexibility for meeting DSRIP project requirements" and an additional year to find necessary funding for DSRIP projects.

Response: HHSC disagrees with both proposals and did not change the rules in response to these comments. The requirements embodied in §354.1632(a)(4) and §354.1634(d) are the result of in-depth negotiations with CMS. Even if these rules were augmented to allow for the changes that commenters propose, CMS would reject the RHP plans as not conforming to the PFM Protocol. Commenters' proposals are not feasible in light of the express agreement between HHSC and CMS.

Comment: Multiple commenters requested that HHSC amend proposed §354.1634(h) to place reasonable time requirements for RHPs to use their remaining RHP allocation in the event that some of that allocation remains after the RHP plan is submitted for approval. Specifically, commenters propose that the rule should allow unused DSRIP funds to remain with an RHP until the end of the second demonstration year.

Response: HHSC recognizes that there are regions that initially lack public funds to fully participate in the waiver. Given that fact, HHSC currently allows an RHP to retain any unused funds for the final three years of the demonstration. However, if HHSC were to allow an RHP to retain unused DSRIP funds until the end of the second demonstration year, any newly proposed DSRIP projects would most likely not be approved by HHSC and CMS until some months into the third demonstration year. That does not provide performers enough time to implement new projects proposed for the final three years of the waiver. Thus, while HHSC will allow some time for regions in need of public funds to find such funds during the second demonstration year, HHSC will need to know before the end of the second demonstration year which DSRIP funds each RHP is unable to use so that those funds may be reallocated to maximize federal funds for the state. HHSC will continue to work with RHPs that need help finding sources of public funds, but will not amend the rule at this time. (Note: proposed §354.1634(h) has been changed to §354.1634(i) in the final rule.)

Comment: Multiple commenters requested that HHSC clarify how the minimum funding requirements across DSRIP categories interact with the minimum DSRIP requirements set forth in §354.1632 for Tier 4 RHPs.

Response: The minimum funding requirements across DSRIP categories embodied in §354.1634(h) apply to individual performers whereas the minimum DSRIP requirements embodied in §354.1632 apply to an RHP as a whole. HHSC did not change the rules in response to this comment.

Comment: Multiple commenters requested that HHSC clarify if the individual DSRIP project valuations are limited to $50 million or $20 million.

Response: The DSRIP project valuation limit was one of many negotiations with CMS. Ultimately, as embodied in the PFM Protocol, the agreement was to limit a DSRIP project valuation to 10% of a performer's Pass One allocation or $20 million, whichever is greater. The final valuation limit is included in §354.1634(h)(4).

Comment: Multiple commenters requested that HHSC affirm that it will timely review valuations for DSRIP projects and will consult with the anchor regarding projects as RHP plans are being finalized.

Response: HHSC is committed to reviewing all aspects of the RHP plans in an expeditious manner and has every intention of working with anchors and performers to craft transformative and approvable DSRIP projects. HHSC did not change the rules in response to this comment.

Comment: Multiple commenters proposed that Uncompensated Care pool payments should not be delayed due to DSRIP valuation objections raised by CMS.

Response: HHSC intends to make Uncompensated Care pool payments concurrent with CMS review of RHP plans. HHSC did not change the rules in response to this comment.

Comment: Multiple commenters requested that HHSC clarify the valuation requirements so that Tier 4 RHPs are not burdened any further.

Response: The final rules reflect the minimum requirements as embodied in the PFM Protocol. HHSC does not intend to add more requirements on any RHP than are necessary.

Comment: HHSC should allow a non-Medicaid provider that is acting as an anchor to receive a DSRIP for the first demonstration year.

Response: HHSC recognizes that there are several anchors who do not fit within the §354.1634(c)(1) requirement that an anchor must be a Medicaid provider to receive the DSRIP for the first demonstration year. HHSC continues to work with CMS to find a solution to this issue but declines to amend the rule at this time. HHSC will also continue to work with individual anchors to aid them in finding solutions. HHSC did not change the rules in response to this comment.

Comment: If HHSC does not allow the first demonstration year anchor payment to be paid to non-Medicaid provider anchors, HHSC should remove the prohibition in §354.1612(d)(1) that limits the types of entities within an RHP from which an anchor may seek reimbursement for services and related costs.

Response: HHSC recognizes the valuable services an anchor provides to an RHP. HHSC continues to work with CMS and individual anchors to find a solution to this funding issue. However, HHSC declines to amend the rule at this time.

Comment: One commenter requested that HHSC amend the definition of "public funds" used in proposed §354.1602(18) to include "federal funds unless they are authorized by federal law to be used to match other federal funds." This language is consistent with 42 C.F.R. §433.51(c).

Response: The definition of "public funds" contained in the final rule remains unchanged. HHSC believes that it is important to maintain consistency between terms that have the same meaning. "Public funds" is used in other parts of the Texas Administrative Code, including the rule regarding reimbursement under this waiver. HHSC believes the definition is consistent with federal law and does not negate any portion of 42 C.F.R. §433.51(c). (Note: proposed §354.1602(18) has been changed to §354.1602(21) in the final rule.)

Comment: The PFM Protocol provides that physician practice plans affiliated with an academic health science center, major cancer hospitals, and children's hospitals may perform DSRIP projects outside of the region where the performer's institution is physically located if it receives an allocation from that region. Commenter requests that §354.1611(c) be clarified to allow such providers to participate in more than one RHP.

Response: HHSC concurs with this request and has added §354.1611(d) to include physician group practices affiliated with an academic health science center, major cancer hospitals, and children's hospitals as entities that can participate in more than the region in which they are physically located.

Comment: A commenter requested that HHSC amend §354.1622(a) to comply with the PFM Protocol requirement that, within 30 days of submission, HHSC will complete its initial review of each timely submitted RHP plan proposal and notify the anchor of its decision.

Response: The RHP plan approval process as embodied in §354.1622(a) is consistent with the requirements in the PFM Protocol. HHSC declines to amend §354.1622(a) at this time.

Comment: A commenter requested that HHSC amend §354.1622(c) to comply with the PFM Protocol requirement that HHSC must allow an anchor's possible response to a notification as described in §354.1622(b) to include "a request for additional time to address HHSC's comments, provided that the RHP's revised plan addresses HHSC's comments and is submitted to HHSC within 15 days of the notification."

Response: The RHP plan approval process as embodied in §354.1622(c) is consistent with the requirements in the PFM Protocol. HHSC declines to amend §354.1622(c) at this time.

Comment: HHSC should clarify that "of" in §354.1634(e)(4)(B) in between "Tier 3" and "Tier 4" should be "or."

Response: HHSC concurs with this request and has modified "of" in §354.1634(e)(4)(B) to "or."

Comment: A commenter requested that HHSC remove subparagraphs (C) and (D) from §354.1634(i)(5) as they are unnecessary, duplicative, and could create confusion.

Response: HHSC concurs with this request and has removed §354.1622(j)(5)(C) and (D). (Note: proposed §354.1634(i) has been changed to §354.1634(j) in the final rule.)

Comment: The Special Terms and Conditions for the waiver state that "(o)nly providers participating in a RHP are eligible to receive a UC Payment, although exceptions may be approved by CMS on a case by case basis." A commenter requested that the above quoted language be included in the final rule to conform to CMS expectations.

Response: HHSC concurs with the request and has added new §354.1611(e) to reflect the above quoted language.

Comment: HHSC was negotiating both the PFM Protocol and the RHP Planning Protocol while the §1115 program rules were being proposed. As a result, the proposed rules do not precisely mirror the requirements contained in those two protocols. A commenter requested that the final rule reflect the agreements made with CMS embodied by the protocols.

Response: HHSC concurs with this request. The final rules reflect all agreements made with CMS as embodied in the PFM and RHP Planning Protocols.

In addition to revisions made in response to public comments, HHSC also revised §§354.1601(c), 354.1612(f), 354.1613(a)(4), 354.1621(a) and (b)(1), and 354.1632(a)(4) to clarify the proposed rule language.

DIVISION 1. GENERAL

1 TAC §354.1601, §354.1602

Legal Authority

The new rules are adopted under Texas Government Code §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

§354.1601. Introduction.

(a) The purpose of this subchapter is to govern implementation of the demonstration waiver under §1115 of the Social Security Act, entitled "Texas Healthcare Transformation and Quality Improvement Program" (the waiver).

(b) Subject to all agreements with the Centers for Medicare and Medicaid Services, this subchapter describes the criteria for participation in a Regional Healthcare Partnership and the allocation and use of waiver funds.

(c) Rules related to reimbursement for hospitals and physician services under the waiver are codified at Chapter 355, Subchapter J, Division 11 of this title (relating to Texas Healthcare Transformation and Quality Improvement Program Reimbursement).

§354.1602. Definitions.

The following terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise.

(1) Administrative Cost Claiming Protocol--A document that explains the process the State will use to determine administrative costs incurred under the waiver.

(2) Anchor--The governmental entity identified by HHSC as having primary administrative responsibilities on behalf of a Regional Healthcare Partnership (RHP).

(3) Centers for Medicare and Medicaid Services (CMS)--The federal agency within the United States Department of Health and Human Services responsible for overseeing and directing Medicare and Medicaid, or its successor.

(4) Delivery System Reform Incentive Payment (DSRIP)--An incentive payment related to the development or implementation of a program of activity that supports an RHP's efforts to enhance access to health care, the quality of care, and the health of patients and families the RHP serves. A DSRIP payment is not considered patient-care revenue and is not offset against Disproportionate Share Hospital expenditures or other expenditures related to the cost of patient care.

(5) Demonstration year--A 12-month period beginning October 1 and ending September 30.

(6) Domain--A group of similar measures.

(7) DSRIP pool--Funding available to RHP participants under the waiver to compensate them for the value of DSRIP projects.

(8) DSRIP project--An activity selected from the RHP Planning Protocol for implementation in an RHP plan.

(9) Governmental entity--A state agency or a political subdivision of the state, such as a city, county, hospital district, hospital authority, or state entity.

(10) HHSC--The Texas Health and Human Services Commission or its designee.

(11) Intergovernmental transfer (IGT)--A transfer of public funds from a governmental entity to HHSC.

(12) IGT entity--A governmental entity that provides an IGT to fund the non-federal share of the waiver.

(13) Medicaid provider--An entity approved by HHSC to provide Medicaid services.

(14) Metric--A quantitative or qualitative indicator of progress from a baseline toward achieving a milestone.

(15) Milestone--An objective of DSRIP project performance comprised of one or more metrics.

(16) Outcome improvement target--A measure that assesses the results of care experienced by patients, including patients' clinical events, patients' recovery and health status, patients' experiences in the health system, and efficiency/cost.

(17) Participant--An entity participating in an RHP. A participant may be an IGT entity, a performer, or another stakeholder.

(18) Performer--A Medicaid provider that implements one or more DSRIP projects.

(19) Physician group practice--Any business entity, including a partnership, professional association, or corporation, organized under Texas law and established for the purpose of practicing medicine in which two or more physicians licensed in Texas are members of the practice.

(20) Program Funding and Mechanics Protocol (PFM Protocol)--A document containing the waiver program guidelines as agreed upon by HHSC and CMS.

(21) Public funds--Funds derived from taxes, assessments, levies, investments, and other public revenues within the sole and unrestricted control of a governmental entity. Public funds do not include gifts, grants, trusts, or donations, the use of which is conditioned on supplying a benefit solely to the donor or grantor of the funds.

(22) Regional Healthcare Partnership (RHP)--A collaboration of interested participants that work collectively to develop and submit to the state a regional plan for health care delivery system reform. Regional Healthcare Partnerships will support coordinated, efficient delivery of quality care and a plan for investments in system transformation that is driven by the needs of local hospitals, communities, and populations.

(23) RHP allocation--An amount of DSRIP funds allocated to a specific RHP during the DSRIP planning process.

(24) RHP plan--A multi-year plan submitted to HHSC and CMS, as further described in §354.1621 of this subchapter (relating to RHP Plan).

(25) RHP Planning Protocol--A master list of potential DSRIP projects, as well as milestones and metrics applicable to those projects.

(26) Uncompensated Care (UC) hospital--A hospital eligible to be a performer that chooses to receive only UC payments.

(27) Uncompensated Care (UC) pool--Funding available to certain RHP participants, as well as dental and ambulance providers, under the waiver to defray uncompensated care costs.

(28) Waiver--The Texas Healthcare Transformation and Quality Improvement Program demonstration waiver under §1115 of the Social Security Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 2. REGIONAL HEALTHCARE PARTNERSHIPS

1 TAC §§354.1611 - 354.1613

Legal Authority

The new rules are adopted under Texas Government Code §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

§354.1611. Organization.

(a) Each Regional Healthcare Partnership (RHP) has geographic boundaries as prescribed by HHSC.

(b) An RHP is composed of one anchor and other participants, which may include IGT entities, performers, and other regional stakeholders. A single entity may act in multiple roles.

(c) An IGT entity may participate in more than one RHP contingent upon HHSC approval.

(d) A performer may only participate in the RHP where it is physically located. However, a physician group practice affiliated with an academic health science center, major cancer hospital, or children's hospital may participate in another region if it receives an allocation from that region.

(e) Only providers participating in an RHP are eligible to receive a UC payment, although exceptions may be approved by CMS on a case by case basis.

(f) Each RHP is categorized into a tier as follows:

(1) Tier 1 consists of any RHP that contains at least 15% of the state's total population under 200% of the federal poverty level as determined by the 2006-2010 American Community Survey for Texas.

(2) Tier 2 consists of any RHP that contains at least 7% and less than 15% of the state's total population under 200% of the federal poverty level as determined by the 2006-2010 American Community Survey for Texas.

(3) Tier 3 consists of any RHP that contains at least 3% and less than 7% of the state's total population under 200% of the federal poverty level as determined by the 2006-2010 American Community Survey for Texas.

(4) Tier 4 consists of any RHP that:

(A) contains less than 3% of the state's total population under 200% of the federal poverty level as determined by the 2006-2010 American Community Survey for Texas;

(B) does not have a public hospital; or

(C) has one or more public hospitals that, when combined, provide less than 1% of the region's uncompensated care.

§354.1612. Anchors.

(a) Only one entity in a Regional Healthcare Partnership (RHP) may be an anchor.

(b) An entity may be an anchor if it meets the following criteria:

(1) The anchor must be a governmental entity.

(2) If an RHP includes a public hospital, the anchor must be a public hospital, except as described in paragraph (3) of this subsection.

(3) If an RHP does not include a public hospital, or if no public hospital wants to be an anchor, the anchor must be:

(A) a hospital district;

(B) a hospital authority;

(C) a county; or

(D) a state university with an academic health science center.

(4) If a region cannot agree on an anchor, HHSC will designate the anchor. HHSC will base its decision on criteria such as ability to financially support necessary administrative activities, prior relationships with other participants in the region, and history of participating in community and regional activities outside of the waiver.

(c) An anchor must:

(1) serve as the single point of contact with HHSC for the RHP, except as specified in rule;

(2) facilitate transparent and inclusive meetings among participants to discuss RHP activities;

(3) coordinate RHP activities to help ensure that participants properly address both the needs of the region and the requirements placed upon the RHP;

(4) develop the RHP needs assessment included in the RHP plan;

(5) compile and submit the RHP plan to HHSC, as prescribed by HHSC;

(6) prepare and submit an annual progress report on behalf of the RHP, in accordance with HHSC requirements;

(7) ensure that all confidential information obtained through its role as an anchor remains confidential as required by state and federal laws and regulations;

(8) ensure that all waiver information provided to it in its capacity as anchor is distributed to the RHP participants; and

(9) meet all other requirements as specified in the Program Funding and Mechanics Protocol.

(d) An anchor must not:

(1) request reimbursement from a Medicaid provider for the discharge of the anchor's responsibilities, although an anchor and other governmental entities within the RHP may agree to share such costs;

(2) delegate decision-making responsibilities concerning the interpretation of the waiver, HHSC policy, or actions or decisions that involve the exercise of discretion or judgment;

(3) require any IGT entity to fund any project;

(4) require any participant to act as a performer in any DSRIP project; or

(5) prevent or in any way prohibit the development of a DSRIP project between an IGT entity and a performer.

(e) An anchor may delegate ministerial functions such as data collection and reporting. Any entity to which ministerial functions are delegated under this subchapter must comply with the roles, responsibilities, and limitations of an anchor.

(f) In addition to any reimbursement received under §354.1634(e) of this subchapter (relating to Waiver Pool Allocation and Valuation), an anchor may be reimbursed for the cost of its administrative duties conducted on behalf of the RHP. The anchor must provide an intergovernmental transfer to HHSC for the purpose of obtaining federal matching funds in accordance with the Administrative Cost Claiming Protocol so that it can be reimbursed for such costs. An anchor may not recover more than the anchor's actual costs.

§354.1613. Participants.

(a) IGT entities. An IGT entity:

(1) determines the allocation of its intergovernmental transfer (IGT) funding consistent with state and federal requirements;

(2) participates in Regional Healthcare Partnership (RHP) planning;

(3) if the IGT entity is itself acting as a performer, selects DSRIP projects;

(4) if the IGT entity is not acting as a performer, cooperates with a performer to select DSRIP projects;

(5) provides the non-federal share of uncompensated care (UC) and delivery system reform incentive payment (DSRIP) pool payments for the entities with which it collaborates; and

(6) may review DSRIP project data submitted by associated performers.

(b) Performers. A performer:

(1) develops and implements a DSRIP project;

(2) receives DSRIP;

(3) coordinates submission of DSRIP project information to the anchor for purposes of RHP plan development;

(4) prepares and submits DSRIP project metric data on a semi-annual basis;

(5) prepares and submits other reports as required by HHSC and the Centers for Medicare and Medicaid Services; and

(6) participates in RHP planning.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. RHP PLAN CONTENTS AND APPROVAL

1 TAC §354.1621, §354.1622

Legal Authority

The new rules are adopted under Texas Government Code §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

§354.1621. RHP Plan.

(a) A performer may receive DSRIP only if HHSC and the Centers for Medicare and Medicaid Services have approved the RHP plan with which the performer is associated.

(b) An RHP plan must:

(1) meet the requirements listed in the Program Funding and Mechanics Protocol (PFM Protocol) and the RHP Planning Protocol;

(2) describe the Regional Healthcare Partnership's (RHP's) health care needs, referencing sources used;

(3) include a list of IGT entities, performers, and UC hospitals;

(4) include a certification that all the information contained within the RHP plan is true and accurate;

(5) describe the processes used to engage stakeholders including the public meetings held, public posting of the RHP plan, and the process for submitting public comment on the RHP plan;

(6) include a reasonable estimate of the available non-federal funds in the region, by demonstration year, to support the UC and DSRIP pools;

(7) include the total amount of estimated UC and DSRIP funding to be used by demonstration year;

(8) include the minimum number of DSRIP projects as described in §354.1632 of this subchapter (relating to DSRIP Requirements for Regional Healthcare Partnerships);

(9) list all DSRIP projects submitted to the RHP for consideration, including those DSRIP projects proposed by RHP participants that were not selected for inclusion in the RHP plan;

(10) include a narrative explaining how all of the DSRIP projects selected by the RHP will:

(A) address the community needs outlined in the RHP plan; and

(B) demonstrate health care delivery transformation and improvement in the quality of care provided in that RHP; and

(11) include a description of each DSRIP project that must:

(A) include the milestones and metrics associated with the project;

(B) for each milestone, include the estimated DSRIP funding;

(C) contain a reasonable estimate of the IGT provided by the IGT entity in connection with the DSRIP project as well as the identity of the IGT entity;

(D) explain how the project addresses the regional health care needs stated within the RHP plan;

(E) justify the amount of DSRIP funding estimated for the project; and

(F) explain how the DSRIP funding will not duplicate the funding for federal activities or initiatives funded by the U.S. Department of Health and Human Services.

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DIVISION 4. DSRIP

1 TAC §§354.1631 - 354.1634

Legal Authority

The new rules are adopted under Texas Government Code §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

§354.1631. DSRIP Categories.

(a) A performer must choose DSRIP projects from the following categories listed in the RHP Planning Protocol:

(1) "Infrastructure Development" (Category 1) includes DSRIP projects that lay the foundation for delivery system transformation through investments in technology, tools, and human resources.

(2) "Program Innovation and Redesign" (Category 2) includes piloting, testing, and replicating of innovative care models.

(3) "Quality Improvements" (Category 3) requires an outcome related to Category 1 and Category 2 DSRIP projects.

(4) "Population Focused Improvements" (Category 4) includes reporting measures across several domains of healthcare and public health.

(b) A DSRIP project selected from the RHP Planning Protocol must include the associated milestones and metrics as approved by HHSC and the Centers for Medicare and Medicaid Services.

§354.1632. DSRIP Requirements for Regional Healthcare Partnerships.

(a) Each Regional Healthcare Partnership (RHP) must select a minimum number of projects from Categories 1 and 2.

(1) An RHP in Tier 1 must select a minimum of twenty DSRIP projects from Categories 1 and 2 combined. Of those twenty DSRIP projects, the RHP must select at least ten projects from Category 2.

(2) An RHP in Tier 2 must select a minimum of twelve DSRIP projects from Categories 1 and 2 combined. Of those twelve DSRIP projects, the RHP must select at least six projects from Category 2.

(3) An RHP in Tier 3 must select a minimum of eight DSRIP projects from Categories 1 and 2 combined. Of those eight DSRIP projects, the RHP must select at least four projects from Category 2.

(4) An RHP in Tier 4 must select a minimum of four DSRIP projects from Categories 1 and 2 combined. Of those four DSRIP projects, the RHP must select at least two projects from Category 2.

(b) Two or more performers in the same RHP may not select the same DSRIP project if the DSRIP projects affect the identical patient population.

§354.1633. DSRIP Requirements for Performers.

(a) For any DSRIP project in Category 1 or 2, a performer must select at least one process milestone and at least one improvement milestone, as described in the Program Funding and Mechanics Protocol (PFM Protocol). This subsection does not apply to the first demonstration year.

(b) A performer that selects a DSRIP project from Category 1 or 2 must also perform in Category 3. A hospital that selects a DSRIP project from Category 1 or Category 2 must also perform in Category 4.

(c) A performer must have a Category 3 outcome related to each of its Category 1 and Category 2 projects.

(1) A Category 3 outcome must reflect the patient population in the related DSRIP project.

(2) A single Category 3 outcome may relate to more than one Category 1 or Category 2 DSRIP project.

(3) A performer must establish and begin reporting on outcome improvement targets no later than the fourth demonstration year.

(A) A hospital-based performer may defer the establishment of outcome improvement targets until after a baseline is determined for that outcome improvement target. Such baseline must be determined no later than the third demonstration year.

(B) A non-hospital performer may defer identifying outcome improvement targets until a date defined by HHSC. Such performers must select outcome improvement targets and establish baselines for those targets no later than the third demonstration year.

(4) A performer, HHSC, or the Centers for Medicare and Medicaid Services (CMS) may re-assess outcome improvement targets:

(A) A performer may seek to revise an outcome improvement target based on experience and circumstances showing that the target was not set appropriately.

(B) CMS may initiate a review to increase an outcome improvement target if a performer achieves a target two years earlier than projected.

(C) Based on HHSC's annual review of projects and progress by performers, HHSC or its external evaluator may identify outcome improvement targets that require additional refinements.

(d) To fulfill its obligations under Category 4, a hospital, unless exempted by HHSC in accordance with the PFM Protocol, must report on a set of required domains.

(1) Potentially Preventable Admissions (PPAs), Potentially Preventable Readmissions (PPRs), Potentially Preventable Complications (PPCs), Emergency Department (ED), and Hospital Consumer Assessment of Healthcare Providers and Systems (HCAHPS) are all required domains.

(2) Reporting for all required domains, except PPCs, must begin in the third demonstration year. Reporting for PPCs must begin in the fourth demonstration year.

(3) If a performer does not have a population for a Category 4 measure large enough to produce statistically valid data as described in the RHP Planning Protocol, that performer is not required to report the data for that particular Category 4 measure.

(4) A performer may choose to report on the additional optional domain described in the RHP Planning Protocol.

(e) A UC hospital must participate in an annual learning collaborative and report on a subset of Category 4 measures.

(1) The required subset of Category 4 measures consists of three domains: Potentially Preventable Admissions (PPAs), Potentially Preventable Readmissions (PPRs), and Potentially Preventable Complications (PPCs).

(A) If a hospital fails to report on the three domains by the last quarter of the applicable demonstration year, the hospital forfeits UC payments in that quarter.

(B) A hospital may request from HHSC a six-month extension from the end of the demonstration year to report any outstanding Category 4 measures. The hospital will receive the fourth-quarter UC payment only if all outstanding required Category 4 measures are reported within that six-month extension.

(2) A hospital under this subsection is not eligible to receive DSRIP for Category 4 reporting.

§354.1634. Waiver Pool Allocation and Valuation.

(a) Purpose. In an effort to provide certainty to waiver participants, HHSC will provide performer specific allocations. This process requires that certain individual entities receive an allocation based upon a Regional Healthcare Partnership (RHP) specific allocation.

(b) RHP allocation. All available DSRIP funds are allocated among the RHPs for each demonstration year. The share of the DSRIP pool allocated to an RHP will be calculated using the formula: RHP Share of DSRIP Pool = (200%FPL + %MedicaidAcute + 2011UPL)/3, where:

(1) "200%FPL" is the region's share of the state's population with income below 200% of the federal poverty level as determined by the 2006-2010 American Community Survey for Texas;

(2) "%MedicaidAcute" is the region's share of all Texas Medicaid acute care payments in state fiscal year (SFY) 2011. Texas Medicaid acute care payments consist of the sum of Medicaid fee-for-service, Medicaid managed care, Vendor Drug Program, and Primary Care Case Management payments; and

(3) "2011UPL" is the region's share of the state's Medicaid supplemental payments through the former Upper Payment Limit program made to providers in the RHP for SFY 2011.

(c) DSRIP allocation among performers for the first demonstration year. Anchors and performers may receive a DSRIP for the first demonstration year after review and approval of the RHP plan by HHSC.

(1) An anchor that is also a Medicaid provider is allocated 20% of the RHP allocation for the first demonstration year. An anchor may also receive a portion of the allocation in paragraph (2) of this subsection if it independently qualifies under that paragraph.

(2) The amount of the RHP allocation for the first demonstration year not allocated to the anchor as described in paragraph (1) of this subsection is allocated to performers as follows:

(A) First, divide the value of all of a performer's DSRIP projects by the total value of all DSRIP projects in an RHP.

(B) Second, multiply the result in subparagraph (A) of this paragraph by 80% of the RHP allocation for the first demonstration year for that RHP, or 100% if the anchor is not a Medicaid provider. The result is the first demonstration year DSRIP to the performer.

(3) In the event that the RHP plan is not approved by the Centers for Medicare and Medicaid Services or an RHP deletes a DSRIP project without a replacement, HHSC may recoup the DSRIP for the first demonstration year.

(d) Two-pass process for allocating DSRIP. The DSRIP pool is allocated to performers for the second through fifth demonstration years through a two-stage process.

(1) The first stage (Pass One) sets an initial allocation to each potential performer, described further in subsection (e) of this section.

(2) Any unused DSRIP funds allocated in Pass One remain in the RHP for the second stage (Pass Two). An RHP may begin Pass Two if:

(A) the RHP funds the minimum number of Category 1 and Category 2 projects in accordance with §354.1632 of this subchapter (relating to DSRIP Requirements for Regional Healthcare Partnerships);

(B) each performer meets the allocation requirements among the four DSRIP categories as described in subsection (h) of this section;

(C) the minimum percentage of the Pass One allocation to non-profit and other private hospitals is met as follows:

(i) A Tier 1 RHP must fund 30% of the Pass One allocation to non-profit and other private hospitals.

(ii) A Tier 2 RHP must fund 30% of the Pass One allocation to non-profit and other private hospitals.

(iii) A Tier 3 RHP must fund 15% of the Pass One allocation to non-profit and other private hospitals.

(iv) A Tier 4 RHP must fund 5% of the Pass One allocation to non-profit and other private hospitals; and

(D) the minimum number of safety net hospitals in an RHP perform DSRIP projects. If there are fewer safety net hospitals in an RHP than are required to perform as follows, then all safety net hospitals in that RHP must perform DSRIP projects.

(i) At least five safety net hospitals in a Tier 1 RHP must perform DSRIP projects.

(ii) At least four safety net hospitals in a Tier 2 RHP must perform DSRIP projects.

(iii) At least two safety net hospitals in a Tier 3 RHP must perform DSRIP projects.

(iv) At least one safety net hospital in a Tier 4 RHP must perform DSRIP projects.

(3) For purposes of this subsection, a safety net hospital is any hospital that, as described in subsection (e) of this section:

(A) participated in the Disproportionate Share Hospital (DSH) program and:

(i) received at least 15% of the RHP's Medicaid acute care payments in SFY 2011 for all hospitals that receive a Pass One allocation; or

(ii) has a trended 2012 hospital-specific limit (HSL) that represents at least 15% of the RHP's total HSL; or

(B) has a Pass One allocation for demonstration years two through five of greater than $60 million.

(e) Pass One DSRIP allocation among performers. Entities within an RHP may be allocated an amount from the RHP allocation described in subsection (b) of this section.

(1) The RHP allocation is divided among certain classes of providers within the RHP as follows:

(A) hospitals are allocated 75%;

(B) community mental health centers are allocated 10%;

(C) academic health science centers are allocated 10%; and

(D) local health departments are allocated 5%.

(2) A hospital may receive a Pass One allocation only if the hospital participated in FFY 2012 Disproportionate Share Hospital program or the former Upper Payment Limit program in Federal Fiscal Year (FFY) 2011.

(3) The share of the RHP allocation that is allocated to hospitals is further divided among the hospitals according to the following formula: Hospital Share of RHP Allocation = (.25 x 2011UPL) + (.25 x MedicaidAcute) + (.50 x HSLCharity), where:

(A) "HSLCharity" is the hospital's share of the total hospital specific limit (HSL) for all hospitals in the RHP that receive a Pass One allocation. If a hospital eligible for a Pass One allocation does not have a FFY 2012 HSL, "HSLCharity" is measured by that hospital's charity care costs as reported in the 2010 Annual Hospital Survey trended to 2012 by a 4% total trend over the two-year period;

(B) "MedicaidAcute" is the hospital's share of all Medicaid acute care payments in SFY 2011 to hospitals in the RHP that receive a Pass One allocation. Texas Medicaid acute care payments consist of the sum of Medicaid fee-for-service, Medicaid managed care, and Primary Care Case Management payments; and

(C) "2011UPL" is the hospital's share of the Medicaid supplemental payments through the former Upper Payment Limit program made to hospitals that received a Pass One allocation in the RHP for SFY 2011.

(4) Option for collaboration. Certain entities may combine their Pass One allocation to create one or more DSRIP projects that further the goal of regional transformation.

(A) A hospital in an RHP may combine its Pass One allocation with other hospitals in the same RHP if all of the entities have a Pass One allocation at or below $2 million for the second demonstration year.

(B) An entity in a Tier 3 or 4 RHP as described by §354.1611(f) of this subchapter (relating to Organization) may combine its Pass One allocation with other entities in the same RHP.

(C) All entities involved in such collaboration must state in the RHP plan that they are collaborating freely.

(D) Any DSRIP projects created under this paragraph must still have only one performer, and that performer must follow all other restrictions on performers.

(f) Pass Two DSRIP process. An RHP's unused DSRIP funds from Pass One are reallocated within the RHP.

(1) Hospitals that are ineligible to participate in Pass One that are interested in becoming performers are allocated equal shares totaling 15% of their RHP's unused Pass One allocation.

(2) Physician group practices not affiliated with academic health science centers that are interested in becoming performers are allocated equal shares totaling 10% of their RHP's unused Pass One allocation.

(3) Performers that participated in Pass One are allocated 75% of the unused Pass One allocation.

(A) To calculate an individual performer's Pass Two allocation:

(i) First, determine each performer's percent of the total Pass One funding used for demonstration years two through five; and

(ii) Second, multiply the result in clause (i) of this subparagraph by 75% of the RHP's unused Pass One allocation.

(B) Performers must work cooperatively to implement complementary DSRIP projects and address outstanding community needs.

(4) Within an RHP, performers may collaborate using individual Pass Two allocations to fund a DSRIP project that is a priority for the RHP in a manner similar to subsection (e)(4) of this section.

(g) Anchor directed use of remaining RHP allocation. If there are unused funds after Pass Two, the anchor may collaborate with performers in the RHP to determine which additional DSRIP projects to include in the RHP plan.

(h) Valuation of individual DSRIP projects. Each individual DSRIP project and domain must include a rational monetary value. That value is determined by the performer within the strictures described in this subsection.

(1) Except as described in paragraph (2) of this subsection, a hospital performer must ensure that project values comport with the following funding distribution:
Figure: 1 TAC §354.1634(h)(1)

(2) A hospital that is exempted from Category 4 reporting may allocate the Category 4 funding to Categories 1, 2, or 3.

(3) A non-hospital performer must ensure that the project values comport with the following funding distribution:
Figure: 1 TAC §354.1634(h)(3)

(4) A Category 1 or 2 DSRIP project may be valued at no more than the greater of 10% of a performer's Pass One allocation or $20 million in total for demonstration years two through five. For DSRIP projects conducted under the collaboration options, the project may be valued at no more that the greater of the sum of 10% of each collaborator's Pass One allocation or $20 million in total for demonstration years two through five.

(5) Milestones for a Category 1 or 2 DSRIP project must be valued equally within a demonstration year.

(6) The minimum Category 3 funding percentages for the fourth and fifth demonstration years as identified in this subsection must be reserved for outcome improvement targets.

(7) For the third, fourth, and fifth demonstration years, 5% of the possible Category 4 funding is only available to performers that report on the optional domain as it is described in the RHP Planning Protocol.

(i) One time reassessment of RHP allocation. If, upon final submission to HHSC, an RHP plan does not include the entire RHP allocation, the RHP will have one opportunity to use the remaining RHP allocation for demonstration years three through five. If the RHP does not use the remaining RHP allocation, the unused portion will be redistributed across regions in a manner prescribed by HHSC. These unused DSRIP funds may be used to fund new DSRIP projects for demonstration years three through five. To receive redistributed funds, an RHP must meet the broad hospital and minimal safety net hospital participation as described in subsection (d)(2)(C) and (D) of this section.

(j) DSRIP performance. Payment for DSRIP project performance is based on achievement of a milestone bundle, outcome, or domain.

(1) A milestone bundle is the compilation of milestones and related metrics associated with a project in a given demonstration year.

(2) The amount of the DSRIP to the performer is determined by the value assigned for the DSRIP project for that demonstration year and the progress made within the milestone bundle.

(3) To calculate the payment for Categories 1 and 2:

(A) First, a performer must complete the actions associated with a metric to include that metric in the DSRIP payment calculation.

(B) Second, a milestone is assigned an achievement value of:

(i) 1.0 if all metrics are met;

(ii) 0.75 if at least 75% of the metrics are met;

(iii) 0.5 if at least 50% of the metrics are met;

(iv) 0.25 if at least 25% of the metrics are met; and

(v) zero if less than 25% of the metrics are met.

(C) Third, the achievement values for each milestone are summed.

(D) Fourth, the result of subparagraph (C) of this paragraph is divided by the total possible achievement value of the milestone bundle.

(E) Fifth, the value of the DSRIP project for that demonstration year, as determined under subsection (h) of this section, is multiplied by the result of subparagraph (D) of this paragraph.

(4) Although DSRIP project performance is reported twice a year, once the action associated with a metric is reported as complete, that metric may not be counted again toward DSRIP payment calculations.

(5) Eligibility for payment for Category 4 performance is based on the following:

(A) For a payment of up to 5% of its allocation for the second demonstration year, a performer must submit a status report to HHSC that describes system changes put in place to prepare for Category 4 reporting for the duration of the waiver.

(B) For a payment for a domain in the third, fourth, or fifth demonstration years, a performer must report on all Category 4 measures included in the domain as described in the RHP Planning Protocol.

(6) A performer may assign different values to Category 3 outcomes, including both process milestones and outcome improvement targets.

(A) A performer must fully achieve metrics associated with process milestones to receive DSRIP related to those milestones.

(B) To calculate a payment for an outcome improvement target:

(i) First, an outcome improvement target is assigned an achievement value of:

(I) 1.0 if the outcome improvement target is achieved;

(II) 0.75 if the outcome improvement target is at least 75% achieved;

(III) 0.5 if the outcome improvement target is at least 50% achieved;

(IV) 0.25 if the outcome improvement target is at least 25% achieved; or

(V) zero if the outcome improvement target is less than 25% achieved.

(ii) Second, the result in clause (i) of this subparagraph is multiplied by the value listed in the RHP plan for that particular outcome improvement target.

(7) If a performer does not complete all milestones as specified in its RHP plan for a particular demonstration year, the performer may carry forward the available DSRIP funding associated with that milestone bundle until the end of the following demonstration year.

(A) The performer must complete the remaining milestones during the following demonstration year to receive full payment for those milestones.

(B) A performer must provide a narrative description on the status of the missed milestones and outcome improvement targets and outline the performer's plan to achieve the missed milestones or targets by the end of the following demonstration year.

(C) This provision does not apply to Category 4.

(8) If a performer does not complete the remaining milestones as described in paragraph (7) of this subsection or the Category 4 reporting in its particular year, the associated DSRIP funding is forfeited.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
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Proposal publication date: August 24, 2012
For further information, please call: (512) 424-6900

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SUBCHAPTER F. PHARMACY SERVICES

The Texas Health and Human Services Commission (HHSC) adopts the amendments to §354.1901, concerning Pharmacy Claims; §354.1921, concerning Addition of Drugs to the Texas Drug Code Index; §354.1923, concerning Review and Evaluation; and §354.1927, concerning Retention and Deletion of Drugs. The amendment to §354.1921 is adopted with changes to the proposed text as published in the April 13, 2012, issue of the *Texas Register* (37 TexReg 2479). The text of the rule will be republished. The amendments to §§354.1901, 354.1923, and 354.1927 are adopted without changes to the proposed text as published in the April 13, 2012, issue of the *Texas Register* (37 TexReg 2479) and will not be republished.

Background and Justification

The amendments are adopted to clarify the Medicaid Vendor Drug Program (VDP) drug pricing rules and thereby standard-

ize pharmaceutical manufacturers' price reporting. The adopted rules will improve administrative efficiency by clarifying pharmaceutical manufacturers' responsibilities and improving the drug price reporting process. The benefits of clarifying these rules, and the resulting standardization of pharmaceutical companies' price reporting, have been confirmed by feedback from stakeholders.

The adopted amendments are consistent with, and help carry out, the federal mandate to reimburse providers at HHSC's best estimate of prices generally and currently paid (42 C.F.R. §447.502 and 42 C.F.R. §447.512). The adopted amendments also are in accordance with HHSC's approved Medicaid State Plan. The integrity of HHSC's regulatory system depends on pharmaceutical manufacturers reporting their market prices accurately and in good faith. This regulatory system fails if manufacturers do not report accurate market prices to HHSC.

Federal law requires HHSC to reimburse Medicaid pharmacies at HHSC's best estimate of provider acquisition cost (EAC). Reported manufacturer prices are the foundation of HHSC's calculation of EAC, and manufacturers have a legal obligation to know HHSC's price reporting requirements. Drug manufacturers must therefore provide complete and accurate pricing information. Failure to do so could result in liability under the Texas Medicaid Fraud Prevention Act (Texas Human Resources Code, Chapter 36) or other law.

In 2003, the United States Department of Health and Human Services, Office of Inspector General (HHS/OIG) published its "OIG Compliance Program Guidance for Pharmaceutical Manufacturers." HHS/OIG's guidance can be found in the *Federal Register* (68 Fed. Reg. 23731 (May 5, 2003)). This guidance raised concerns that some pharmaceutical manufacturers were illegally manipulating published average wholesale prices (AWPs) in order to increase reimbursements paid to their customers by federally funded health care programs. Similar to the recommendation in HHS/OIG's guidance, HHSC suggests that manufacturers review their AWP reporting practices to ensure that their AWPs are an accurate reflection of true market prices.

HHSC's acceptance and use of manufacturer reported pricing information, or HHSC's use of pricing information obtained from pricing compendiums, including published AWP, is not confirmation by HHSC that the pricing information is true and correct or that the pricing information is an accurate representation of drug manufacturers' actual market prices.

Concurrently, notice of the adoption of amendments to §355.8541 and §355.8542, related to pharmacy services reimbursement, appears elsewhere in this issue of the *Texas Register.*

Comments

During the public comment period, which included a public hearing in Austin on May 8, 2012, HHSC received comments from King & Spalding, GlaxoSmithKline, and the National Association of Chain Drug Stores. A summary of the comments and the responses follow.

Comment: HHSC is proposing to require that manufacturers submit price points that are not defined in other federal, state, or industry contexts. It is suggested that HHSC accept as a standard part of the VDP price reporting regime manufacturer reasonable assumptions in calculations.

Response: HHSC has required these price points and provided guidance for many years. HHSC has further clarified these price points in the proposed rules. Reasonable assumptions must be guided by the Texas Administrative Code; the Centers for Medicare and Medicaid Services (CMS)-approved Texas Medicaid State Plan; applicable state and federal law; and any other policy guidance provided by the State of Texas and the United States, including public meetings, published program guidance, and the May 5, 2003, OIG Compliance Program Guidance for Pharmaceutical Manufacturers.

Comment: HHSC requires manufacturers to report drug pricing updates monthly. This requirement is strongly opposed as it is overly burdensome and costly. It is suggested that HHSC move to quarterly reporting with a 30-day period for submission of prices.

Response: HHSC's intent in the proposed rule was to allow manufacturers to report their monthly price updates at one time (by the 10th of each month). HHSC recognizes that reporting a price update that occurs at the end of a month could be a problem for manufacturers to report the change by the 10th of the next month. Therefore, HHSC has revised the proposed language in §354.1921(c)(2)(A) to clarify the intent of the proposed language and to clarify the due dates for monthly price reporting. If a price change occurs on or before the 10th day of the month, the manufacturer sends the price update to HHSC by the 10th day of the next month (for example, if a price change occurs on August 8, the due date is the 10th day of September). If a price change occurs after the 10th day of the month, the manufacturer sends the price update by the 10th day of the second month after the month in which the price change occurs (for example, if a price change occurs on August 11, the due date is the 10th day of October). It is also HHSC's intent that a "day" in this context means a day that is not a Saturday, Sunday, or legal holiday. If the due date falls on such a day, the due date is the next day that is not a Saturday, Sunday, or legal holiday.

Comment: The quarterly AMP should be due 30 days after the close of the quarter.

Response: HHSC is not dictating a deadline in the rules for the quarterly submission of AMP.

Comment: HHSC should not require more frequent price updates without amending the rule.

Response: Certain circumstances may require that manufacturers update pricing on a more frequent basis. Therefore, HHSC reserves the right to request a price update as warranted. Such a request would occur infrequently and on an ad hoc basis to remedy an immediate problem.

Comment: A monthly report will require system upgrades and additional staff.

Response: Manufacturers have until January 2013 to upgrade systems and acquire additional staff to accommodate the monthly reporting requirement.

Comment: Manufacturers should simply be required to submit updated prices, not to show what prices have changed.

Response: Manufacturers will know more easily than HHSC which prices have changed. If manufacturers do not show which prices have changed, HHSC staff must manually compare pricing update reports to know which prices have changed. No changes were made to the proposed rule language in response to the comment.

Comment: There are concerns regarding price concessions, including lagged price concessions, bona fide service fees, and

forecasted price concessions for at-launch products if a manufacturer has forecasted price concessions.

Response: In its definition of price concession at §354.1921(g)(11), HHSC references 42 C.F.R. §414.804, which outlines the requirements for using the 12-month average estimation methodology, including bona fide service fees. HHSC is only asking for forecasted price concessions at product launch if the manufacturer has this information in its internal business records.

Comment: With few exceptions, drug manufacturers never have a single price for a price point. It is suggested that HHSC require submission of a single, weighted average figure for each of the four Texas-specific price points, rather than the three figures currently proposed--a high end of the range, a low end of the range, and a weighted average within the range. This is an expensive and onerous requirement.

Response: HHSC currently receives ranges in addition to weighted averages within the range from numerous manufacturers. HHSC expects that all manufacturers are able to provide this information. No changes were made to the rule language.

Comment: It is suggested that HHSC clarify that manufacturers may smooth lagged ineligible indirect sales as is permitted in average sales price (ASP).

Response: HHSC does not prescribe in the rules how manufacturers calculate lagged ineligible indirect sales.

Comment: There is concern that HHSC has not provided guidance regarding the calculation of the four Texas-specific price points. This includes guidance regarding the use of reasonable assumptions, price points under which certain classes of trade should be reported, and how to report no eligible sales in a reporting period.

Response: Manufacturers are required to provide actual data when possible. HHSC acknowledges that manufacturers might use reasonable assumptions. Reasonable assumptions must be guided by the Texas Administrative Code; the CMS-approved Texas Medicaid State Plan; applicable state and federal law; and any other policy guidance provided by the State of Texas and the United States, including public meetings, published program guidance, or the May 5, 2003, OIG Compliance Program Guidance for Pharmaceutical Manufacturers. The reporting category under which certain classes of trade should be reported is dependent on the manufacturer's business model, which would help the manufacturer determine where certain classes of trade belong. At this time, it is not HHSC's intent to capture prices for specialty pharmacies, mail-order pharmacies, and closed-door pharmacies. It is acceptable for a manufacturer to report no eligible sales in the appropriate price reporting category; HHSC prefers this to be reported as N/A.

Comment: Clarity is requested on what is meant by a community or institutional pharmacy license as included in the definition of "pharmacy."

Response: Pharmacy license classifications are defined in the Occupations Code, §560.051.

Comment: Are "eligible pharmacies" those located in the US or Texas?

Response: HHSC prefers that manufacturers submit pricing data for eligible pharmacies in Texas, if readily available. No changes were made to the rule language.

Comment: What is meant by "direct sales" to pharmacies, chain pharmacies, and long term care pharmacies?

Response: HHSC has historically understood, and provided guidance to manufacturers, that direct sales means those sales made by a manufacturer to a pharmacy directly, without the use of an intermediary--this does not include indirect sales.

Comment: Request that HHSC clarify the requirements for calculating the "price to wholesaler/distributor." It is suggested that HHSC clarify and acknowledge that calculation of price to wholesaler/distributor includes indirect sales prices to purchasers other than the wholesalers or distributors themselves, purchasers from across the commercial spectrum.

Response: The calculation of "price to wholesaler/distributer" includes indirect sales prices to purchasers other than the wholesalers or distributers themselves.

Comment: The term "Gross Amount Due" in 1 TAC §354.1921(g)(7) is not well defined, and its function is not specified.

Response: HHSC uses the national standard definition of "gross amount due" as defined by the National Council for Prescription Drug Programs (NCPDP) included on the claim payment information submitted by pharmacies. HHSC expects that manufacturers and pharmacies have access to national pharmacy standard information (i.e., NCPDP). In §355.8541, the function of gross amount due is provided.

Comment: Clarify whether the "direct price to long term care pharmacy" price point must be net of price concessions.

Response: HHSC expects the direct price to long term care pharmacy to be net of price concessions, just as it is stated in the definitions for the other price points. HHSC clarified the proposed rule language in §354.1921(g)(5) in response to this comment.

Comment: HHSC should eliminate the requirement that manufacturers submit AWP. Certain manufacturers do not establish or publish an AWP for pharmaceutical products. Manufacturers do not play a role in the third-party price reporting compendia's decisions regarding their publication of AWPs.

Response: AWP is part of the CMS-approved Texas Medicaid State Plan. Until AWP is no longer accepted by CMS and the state plan is amended to reflect such a change, AWP must continue to be a part of Texas reimbursement methodology. No changes were made to the rule language.

Comment: HHSC should amend the requirement that manufacturers provide updates to product status or availability. "Status" is too vague and "availability" should be further defined.

Response: HHSC notes that this is a current requirement and was not proposed for change. As part of the current price reporting process, the manufacturer agrees to inform HHSC, in writing, of any changes in formulation, product status, price, or availability as herein described, within 15 days of such change.

Comment: Manufacturers should be given an opportunity to comment on the Certification of Information template prior to the adoption of the rule.

Response: It is outside the scope of the proposed rulemaking action to provide an opportunity for comment on the Certification of Information (C of I) template. The C of I template will reflect the adopted rules, and HHSC intends to provide the template in

advance of the rule's effective date of January 14, 2013. Questions about the template may be asked of HHSC at that time.

Comment: HHSC should delay the effective date of the rules until CMS publishes its final rule on AMP and to allow manufacturers time to update their systems, procedures, and personnel to adequately comply with the Texas requirements.

Response: HHSC is delaying the effective date of the rule to January 14, 2013. This delay will allow HHSC time to finalize the Certificate of Information template and provide it to manufacturers in advance of the rule's effective date. The delay should also allow manufacturers time to update systems, etc., as needed. It is unclear when CMS will publish its final rule on AMP. After CMS publishes its final rule on AMP, HHSC will determine if another TAC rule change is needed.

DIVISION 6. PHARMACY CLAIMS

1 TAC §354.1901

Statutory Authority

The amendments are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
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DIVISION 7. TEXAS DRUG CODE INDEX--ADDITIONS, RETENTIONS, AND DELETIONS

1 TAC §§354.1921, 354.1923, 354.1927

Statutory Authority

The amendments are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

§354.1921. Addition of Drugs to the Texas Drug Code Index.

(a) A drug company that has a valid rebate agreement under 42 U.S.C. §1396r-8 may apply to the Health and Human Services Commission (Commission) to add a drug to the Texas Drug Code Index (TDCI). The term "drug company" includes any manufacturer, repackager, or private labeler.

(b) To apply for the addition of a drug to the TDCI, a drug company must complete each section of the Certification of Information for the Addition of a Drug Product to the Texas Drug Code Index (Certification of Information) provided by the Commission.

(c) A drug company must also:

(1) update the Commission with changes to formulation, product status, or availability; and

(2) submit changes to the prices requested in the Price Certification section of the Certification of Information, as follows:

(A) send all price updates, except Average Manufacturer Price (AMP) updates, to the Commission by the 10th day of each month.

(i) If a price change occurs on or before the 10th day of the month, send the price update by the 10th day of the next month (for example, if the price change occurs on August 8, the due date is the 10th day of September).

(ii) If a price change occurs after the 10th day of the month, send the price update by the 10th day of the second month after the month in which the price change occurs (for example, if the price change occurs on August 11, the due date is the 10th day of October);

(B) when submitting price updates, include current information for each price on the Certification of Information that changed during the preceding month;

(C) update Average Manufacturer Price (AMP) prices quarterly; and

(D) if required by the Commission, update pricing on a more frequent basis as circumstances warrant.

(d) Sources other than drug companies may request the addition of a drug not currently listed in the TDCI. If the request is not from a drug company, the Commission may request that the manufacturer submit a Certification of Information as described in subsection (b) of this section.

(e) The drug company and other sources, if applicable, are entitled to receive notification of approved or denied Certifications of Information. If a Certification of Information is denied, the Commission will state the reasons for the denial.

(f) Notwithstanding any other state law, pricing information reported by a drug company under this subchapter is confidential and must not be disclosed by the Commission, its agents, contractors, or any other State agency in a format that discloses the identity of a specific manufacturer or labeler, or the prices charged by a specific manufacturer or labeler for a specific drug, except as necessary to permit the Attorney General to enforce state and federal law.

(g) Definitions. The following words and terms, when used in this chapter and in Chapter 355 of this title (relating to Reimbursement Rates), have the following meanings unless the context clearly indicates otherwise.

(1) Average Manufacturer Price (AMP)--The average manufacturer price as defined in 42 USC §1396r-8(k)(1).

(2) Average Wholesale Price (AWP)--The average wholesale price for a drug as published in a price reporting compendium such as First DataBank or Medispan.

(3) Customary Prompt Pay Discount--Any discount off the purchase price of a drug routinely offered by the drug company to a wholesaler or distributor for prompt payment of purchased drugs within

a specified time frame and consistent with customary business practices for payment.

(4) Direct Price to Chain Pharmacy--The amount paid by a chain pharmacy for a product when purchased directly from a drug company, whether delivered directly to a chain warehouse facility or indirectly through a wholesaler or a distributor. The price should be net of price concessions. In reporting this price point to the Commission, if the price is reported as a range, the weighted average of these prices, based on unit sales, must be included. The following prices should be excluded from this price point:

(A) prices excluded from the determination of Medicaid Best Price at 42 C.F.R. §447.505; and

(B) prices to entities participating in the Health Resources and Services Administration (HRSA) 340b discount program.

(5) Direct Price to Long Term Care Pharmacy--The amount paid by a pharmacy servicing a long term care facility, including a nursing facility, assisted living facility, and skilled nursing facility. The price should be net of price concessions. In reporting this price point to the Commission, if the price is reported as a range, the weighted average of these prices, based on unit sales, must be included. The following prices should be excluded from this price point:

(A) prices excluded from the determination of Medicaid Best Price at 42 C.F.R. §447.505; and

(B) prices to entities participating in the Health Resources and Services Administration (HRSA) 340b discount program.

(6) Direct Price to Pharmacy--The amount paid for a product by a pharmacy when purchased directly from a drug company. This price should be net of Price Concessions. In reporting this price point to the Commission, if the price is reported as a range, the weighted average of these prices, based on unit sales, must be included. The following prices should be excluded from this price point:

(A) prices excluded from the determination of Medicaid Best Price at 42 C.F.R. §447.505;

(B) prices to entities participating in the Health Resources and Services Administration (HRSA) 340b discount program; and

(C) Direct Prices to a Chain Pharmacy or Direct Prices to Long Term Care Pharmacy.

(7) Gross Amount Due--Has the meaning as defined by the National Council for Prescription Drug Programs.

(8) "may apply to the Commission"--The act of applying to have a drug included on the TDCI. This includes completing the Certification of Information for the Addition of a New Drug Product to the Texas Drug Code Index, submitting National Drug Code (NDC) changes, submitting price updates, and submitting additional package sizes for a drug that is already included on the TDCI.

(9) National Drug Code (NDC)--The 11-digit numerical code established by the U.S. Food and Drug Administration that indicates the labeler, product, and package size.

(10) Pharmacy--An entity with an approved community pharmacy license or an institutional pharmacy license.

(11) Price concession--An action by a manufacturer (other than a customary prompt-pay discount as defined in this section) that has the effect of reducing the net cost of a product to a purchaser. The term includes discounts, rebates, billbacks, chargebacks, or other adjustments to pricing or payment terms. Lagged price concessions must be accounted for in the Reported Manufacturer Pricing by operation of a 12-month average estimation methodology as described in 42 C.F.R. §414.804. For new, at launch products, if a manufacturer has forecasted price concessions, the initial Reported Manufacturer Pricing should reflect this internal business information.

(12) Price to Wholesaler/Distributor--The amount paid by a wholesaler or a distributor. The price should be net of price concessions. In reporting this price point to the Commission, if the price is reported as a range, the weighted average of these prices, based on unit sales, must be included. The following prices should be excluded from this price point:

(A) prices excluded from the determination of Medicaid Best Price at 42 C.F.R. §447.505; and

(B) prices to entities participating in the Health Resources and Services Administration (HRSA) 340b discount program.

(13) Reliable Sources--Sources including other state or federal agencies and pricing services, as well as verifiable reports by contracted providers and Vendor Drug Program formulary and field staff.

(14) Reported Manufacturer Pricing--Pricing information submitted to the Commission by a drug company on a Certification of Information, or in subsequent price updates as described in subsections (b) and (c) of this section. This includes: Average Wholesale Price, Average Manufacturer Price, Price to Wholesaler/Distributor, Direct Price to Pharmacy, Direct Price to Chain Pharmacy, and Direct Price to Long Term Care Pharmacy. If a drug company does not have a single price for a price point, it must report a range of prices. If a drug company reports a range of prices, it must also provide the weighted average of these prices based on unit sales.

(15) Warehouse Purchases--Purchases through a central purchasing agreement or from a central purchasing entity. Warehouse purchases will be reimbursed at Direct Price to Chain Pharmacy.

(16) Weighted AMP (Average Manufacturer Price)--The Weighted AMP (Average Manufacturer Price) as contemplated in 42 U.S.C. §1396r-8(b)(3) and (e), and as reported by the Centers for Medicare & Medicaid Services.

(17) Wholesaler Cost--The net cost of a product to a wholesaler; equivalent to Price to Wholesaler/Distributor and cost to wholesaler.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
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CHAPTER 355. REIMBURSEMENT RATES
SUBCHAPTER J. PURCHASED HEALTH SERVICES

The Texas Health and Human Services Commission (HHSC) adopts amendments to §355.8161, concerning reimbursement

methodology for midwife services, and §355.8181, concerning birthing center reimbursement, without changes to the proposed text as published in the August 3, 2012, issue of the *Texas Register* (37 TexReg 5693) and will not be republished.

Background and Justification

Section 2301 of the federal Affordable Care Act (ACA) requires states to provide Medicaid reimbursement to all provider types defined as birth attendants by state law. Texas defines birth attendant as a "physician, certified nurse midwife (CNM), or licensed midwife (LM)." LMs are licensed in Texas by the Department of State Health Services.

To comply with federal law, HHSC will reimburse LMs for their covered professional services. The adopted amendment to §355.8161, therefore, adds a Medicaid reimbursement methodology for those services. In light of the additional education requirements applicable to CNMs, LMs will be reimbursed at a lower rate than CNMs.

The ACA also requires LMs to be reimbursed for services provided to Medicaid clients in a birthing center if LMs are licensed by the state. The adopted amendment to §355.8181 adds LMs as a provider type that may receive Medicaid reimbursement for services provided in a free-standing birthing center.

Comments

The 30-day comment period ended September 2, 2012. During this period, HHSC did not receive any comments regarding the proposed amendments to the rules.

DIVISION 9. MIDWIVES

1 TAC §355.8161

Legal Authority

The amendment is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragon
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Texas Health and Human Services Commission
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DIVISION 10. BIRTHING CENTER SERVICES

1 TAC §355.8181

Legal Authority

The amendment is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragon
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Texas Health and Human Services Commission
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DIVISION 28. PHARMACY SERVICES: REIMBURSEMENT

1 TAC §355.8541, §355.8542

The Texas Health and Human Services Commission (HHSC) adopts the amendments to §355.8541, concerning Legend and Nonlegend Medications, and §355.8542, concerning Drug Price Effective Date, with changes to the proposed text as published in the April 13, 2012, issue of the *Texas Register* (37 TexReg 2485). The text of the rules will be republished.

Background and Justification

The amendments are adopted to clarify the Medicaid Vendor Drug Program (VDP) drug pricing rules, and thereby standardize pharmaceutical manufacturers' price reporting. The adopted rules will improve administrative efficiency by clarifying pharmaceutical manufacturers' responsibilities and improving the drug price reporting process. The benefits of clarifying these rules, and the resulting standardization of pharmaceutical companies' price reporting, have been confirmed by feedback received from stakeholders.

The adopted amendments are consistent with, and help carry out, the federal mandate to reimburse providers at HHSC's best estimate of prices generally and currently paid (42 C.F.R. §447.502 and 42 C.F.R. §447.512). The amendments are also in accordance with HHSC's approved Medicaid State Plan.

Concurrently, notice of the adoption of amendments to §§354.1901, 354.1921, 354.1923, and 354.1927, related to pharmacy policy, appears elsewhere in this issue of the *Texas Register.*

Comments

During the public comment period, which included a public hearing in Austin on May 8, 2012, HHSC received comments from King & Spalding, Reed Elsevier and the National Association of Chain Drug Stores. A summary of the comments and the responses follow.

Comment: It was requested that "Gold Standard" be listed as an approved source of information for the "wholesale estimated acquisition cost (WEAC)" for legend and nonlegend medications pursuant to §355.8541.

Response: HHSC agrees with the comment and has included "Gold Standard" as a source HHSC may use to establish WEAC in §355.8541(b)(4).

Comment: Under §355.8541(b)(1), HHSC has proposed to add the new pricing metric "Direct Price to Chain Pharmacy" (DPCP) into the definition of EAC. The proposed approach for obtaining DPCP pricing is problematic and would yield inaccurate and inappropriate pricing metric.

Response: Reporting DPCP is not a new requirement. DPCP is the new name for warehouse purchases. HHSC has historically used, and will continue to use, this price point as a basis of reimbursement for pharmacies that purchase through a purchasing agreement or central purchasing entity.

Comment: Chain drug stores contend that the price point does not account for their costs associated with warehousing, transporting, inventory control, and infrastructure.

Response: HHSC is not requesting costs associated with warehousing, transporting, inventory control, and infrastructure from manufacturers. These costs are assumed in the dispensing fee component of the total reimbursement provided to pharmacies.

Comment: Chain drug stores contend that, by requiring prices net of price concessions, HHSC will disadvantage pharmacies that cannot negotiate price concessions.

Response: HHSC has always required costs to chain pharmacies, net of all rebates, discounts, and chargebacks from the manufacturer. If a chain pharmacy does not receive these reductions, then the manufacturer would not report these reductions.

Comment: The proposed definition for DPCP does not differentiate between mail order and retail prices.

Response: The definition for DPCP only includes retail pricing. HHSC does not want manufacturers to include mail order pricing in DPCP.

Comment: Distinguishing between chain pharmacies and independent pharmacies is inappropriate and threatens fair and adequate reimbursement.

Response: Based on years of experience comparing net prices between chain and independent pharmacies for the same drugs, HHSC does not consider it inappropriate to differentiate between these two pharmacy types.

Comment: There is concern that DPCP and/or weighted AMP could be used to validate other pricing metrics, and ultimately result in an inaccurate EAC price. The rules give HHSC broad authority to determine "appropriate drug costs" based, in part, on inappropriate pricing metrics such as weighted AMP.

Response: HHSC agrees that AMP may not be a reliable benchmark for pharmacy reimbursement. The weighted AMP from the Centers for Medicare and Medicaid Services (CMS) is intended to address some of the historical inadequacies of the AMP. Therefore, HHSC has added it as a potential source for pricing-related information, which HHSC may use for comparison purposes.

Comment: Dispensing fees must be increased to adequately cover pharmacies' cost of dispensing.

Response: It is outside the scope of these rules to make any changes to the Vendor Drug Program dispensing fee methodology.

HHSC made a minor editorial change to the text of §355.8542, adding the word "to" in the parenthetical reference to Subchapter F, Pharmacy Services.

Legal Authority

The amendments are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

§355.8541. Legend and Nonlegend Medications.

(a) Legend drug reimbursement. A pharmaceutical provider is reimbursed for legend drugs based on the lesser of the:

(1) Health and Human Services Commission's (HHSC's) best estimate of acquisition cost (EAC) plus HHSC's currently established dispensing fee per prescription;

(2) usual and customary price charged the general public; or

(3) Gross Amount Due, if provided.

(b) Estimated acquisition cost (EAC). The EAC is HHSC's best estimate of prices generally and currently paid in the market.

(1) The EAC is defined as the:

(A) wholesale estimated acquisition cost (WEAC);

(B) direct estimated acquisition cost (DEAC), according to the pharmacist's usual purchasing source and the pharmacist's usual purchasing quantity;

(C) direct price to chain pharmacy (DPCP); or

(D) maximum allowable cost (MAC) for multiple source drugs.

(2) The EAC is verifiable by invoice audit conducted by HHSC to include necessary supporting documentation that will verify the final cost to the provider.

(3) All drug purchases through a central purchasing agreement or from a central purchasing entity must be billed to HHSC as DPCP.

(4) The WEAC is established by HHSC using market or government sources, which include, but are not limited to:

(A) Reported Manufacturer Pricing;

(B) First Databank;

(C) Redbook;

(D) Weighted AMP, as published by the Centers for Medicare & Medicaid Services (CMS); or

(E) National Average Drug Acquisition Cost (NADAC), as published by the CMS; or

(F) Gold Standard.

(5) The WEAC may not exceed the Wholesaler Cost, as supplied by a drug company, plus an amount representing wholesaler operating costs and profits. Wholesaler operating conditions may be determined from information supplied to HHSC by drug companies, wholesalers, or other reliable sources. Exceptions to general pricing

determinations may be made on certain drugs and/or drug categories based on information from these same sources.

(6) The DEAC is established by HHSC using direct price information supplied by a drug company. Providers are reimbursed only at the DEAC on all drug products that are available from select manufacturers/distributors who actively seek and encourage direct purchasing.

(7) The DPCP is established by HHSC using price information supplied by a drug company.

(c) Nonlegend drugs.

(1) Reimbursement for nonlegend drugs is based on the lesser of the:

(A) usual and customary price charged to the general public;

(B) EAC, plus 50 percent of the EAC; or

(C) Gross Amount Due, if provided.

(2) No dispensing fee is added to the price of nonlegend drugs paid under this subsection, except as described in paragraph (3) of this subsection.

(3) If 50 percent of the EAC exceeds the standard dispensing fee calculation, the nonlegend drug is reimbursed under subsection (a) of this section.

(d) Public hearing. Notice of a public hearing to receive comments on proposed changes to general pricing determinations derived under this section will be published in the *Texas Register*.

(e) Definitions. The terms used in this section have the meanings as defined for the same terms in §354.1921(g) of this title (relating to Addition of Drugs to the Texas Drug Code Index).

§355.8542. Drug Price Effective Date.

Subject to the requirements of Chapter 354, Subchapter F of this title (relating to Pharmacy Services), new prices and price updates are effective for reimbursement purposes on the day the Health and Human Services Commission receives the new prices and price updates from drug companies, wholesalers, or other reliable sources.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 9, 2012.

TRD-201205263
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: January 14, 2013
Proposal publication date: April 13, 2012
For further information, please call: (512) 424-6900

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 2. TEXAS BOOTSTRAP LOAN PROGRAM

10 TAC §§2.1 - 2.13

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 2, §§2.1 - 2.13, concerning the Texas Bootstrap Loan Program without changes to the proposal as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5904) and will not be republished.

REASONED JUSTIFICATION. This repeal is necessary to allow for the adoption of new 10 TAC Chapter 24, Texas Bootstrap Loan Program rule.

The Department accepted public comments between August 10, 2012 and September 10, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning the repeal.

The Board approved the final order adopting the repeal on October 9, 2012.

STATUTORY AUTHORITY. The repeal is adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules and Texas Government Code, Chapter 2306, Subchapter FF, which specifically authorizes the Department to administer the Texas Bootstrap Loan Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 12, 2012.

TRD-201205322
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: November 1, 2012
Proposal publication date: August 10, 2012
For further information, please call: (512) 475-3916

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CHAPTER 3. COLONIA SELF-HELP CENTER PROGRAM

10 TAC §§3.1 - 3.8

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 3, §§3.1 - 3.8, concerning the Colonia Self-Help Center Program without changes to the proposal as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5904) and will not be republished.

REASONED JUSTIFICATION. This repeal is necessary to allow for the adoption of new 10 TAC Chapter 25, Colonia Self-Help Center Program rule.

The Department accepted public comments between August 10, 2012 and September 10, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning the repeal.

The Board approved the final order adopting the repeal on October 9, 2012.

STATUTORY AUTHORITY. The repeal is adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 12, 2012.

TRD-201205323
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: November 1, 2012
Proposal publication date: August 10, 2012
For further information, please call: (512) 475-3916

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CHAPTER 7. TEXAS FIRST-TIME HOMEBUYER PROGRAM

10 TAC §§7.1 - 7.9

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 7, §§7.1 - 7.9, concerning Texas First-Time Homebuyer Program, without changes to the proposal as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5905) and will not be republished.

REASONED JUSTIFICATION. The repeal will allow the adoption of a new Texas First Time Homebuyer Program Rule which will implement the reorganization and restructuring by the Department of its Housing and Community Affairs Programs.

The Department accepted public comments between August 10, 2012, and September 10, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning the repealed sections.

The Board approved the final order adopting the repeal on October 9, 2012.

STATUTORY AUTHORITY. The repeal is adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules and pursuant to Texas Government Code, §2306.141, which specifically authorizes the Department to promulgate rules implementing the Department's housing programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 10, 2012.

TRD-201205272
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: October 30, 2012
Proposal publication date: August 10, 2012
For further information, please call: (512) 475-3916

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CHAPTER 9. TEXAS NEIGHBORHOOD STABILIZATION PROGRAM

10 TAC §§9.1, 9.2, 9.8

The Texas Department of Housing and Community Affairs (the "Department") adopts amendments to 10 TAC Chapter 9, §9.1 and §9.2; and new §9.8, concerning Texas Neighborhood Stabilization Program, without changes to the proposed text as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5906) and will not be republished.

REASONED JUSTIFICATION. The amendments and new section separate requirements for multi-family Neighborhood Stabilization Program projects from the requirements for single family Neighborhood Stabilization Program projects, which will be located in new 10 TAC Chapter 29, concerning the Texas Single Family Neighborhood Stabilization Program Rule. The adoption of new 10 TAC Chapter 29 is published concurrently with this adoption in this issue of the *Texas Register.* Recently the Department reorganized and restructured all of its housing and community affairs programs. Part of the purpose of the reorganization was to separate single and multi-family program delivery and to standardize much of the single family housing program procedures. These changes were implemented for the purpose of improving the delivery of housing solutions to Texans. This adoption will help accomplish those goals by better aligning the Texas Neighborhood Stabilization Program with new 10 TAC Chapter 20, concerning Single Family Programs Umbrella Rule.

The Department accepted public comments between August 10, 2012, and September 10, 2012. Comments regarding the amendments and new section were accepted in writing and by fax. No comments were received concerning the amendments or new section.

The Board approved the final order adopting the amendments and new section on October 9, 2012.

STATUTORY AUTHORITY. The amendments and new section are adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules. The amendments and new section implement Texas Government Code, Chapter 2306.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 12, 2012.

TRD-201205344
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: November 1, 2012
Proposal publication date: August 10, 2012
For further information, please call: (512) 475-3916

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CHAPTER 20. SINGLE FAMILY PROGRAMS UMBRELLA RULE

10 TAC §§20.1 - 20.15

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 20, §§20.1 - 20.15, concerning the Single Family Programs Umbrella Rule. Sections 20.1, 20.3, 20.6, and 20.10 - 20.12 are adopted with changes to the proposed text as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5859). Sections 20.2, 20.4, 20.5, 20.7 - 20.9, and 20.13 - 20.15 are adopted without changes and will not be republished.

REASONED JUSTIFICATION. Recently the Department reorganized and restructured all of its housing and community affairs programs. Part of the purpose of the reorganization was to separate single and multi-family housing program delivery and to standardize much of the single family housing program procedures. These changes were implemented for the purpose of improving the delivery of housing solutions to Texans. This Single Family Programs Umbrella Rule contains all of the common requirements of the Department's housing programs thereby partially accomplishing the purposes of the reorganization.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

Comments were accepted from August 10, 2012 to September 10, 2012 with comments received from: (1) Ann Williams Cass, ED/Chair, Equal Voice Housing Coalition; (2), Charles Cloutman, Meals on Wheels and More; (3) Donna M. Johnson and Tres Davis, Grantworks, Inc.; (4) Jean Langendorf, Easter Seals; (5) Matt Hull, Texas Association of CDCs; (6) Michael Hunter, Hunter & Hunter Consultants, Inc.; (7) Rachel Edwards, Resource Management & Consulting Co.; and (8) Robin Sisco, Grant Administrator, Langford Community Management Services, Inc.

GENERAL COMMENTS: Chapter 20 - No Specific Section of the Rule References. (1), (4), (6), (7), and (8)

COMMENT SUMMARY: Commenter (1) expressed a concern about rule and definition changes during active contract periods. Commenter (4) recommended that the Department consider including a statement that the Department will make a reasonable accommodation or a reasonable modification in the rules. Commenters (6), (7) and (8) expressed that rules should be streamlined and simplified to reflect requirements that are federally or legislatively mandated.

STAFF RESPONSE: In response to commenter (1), all contracts signed with Contract Administrators clearly indicate laws and rules will apply, as amended, and the Contract Administrators agrees to abide by the changes where applicable. In response to commenter (4), the law already requires reasonable accommodation to program rules, if applicable; therefore, no change to the rule is recommended. In response to Commenters (6), (7), and (8), staff generally agrees with the concept of streamlining and simplifying. However, various federal requirements and laws require the Department to create various policies and procedures. The Department is also required to ensure that risks are kept to a minimum while managing public funds. No changes were recommended based on these general comments.

§20.3. Definitions. (4)

COMMENT SUMMARY: Commenter (4) requested that the definition under paragraph (23), Household, explicitly include renters.

STAFF RESPONSE: Staff agreed with commenter and recommended that the definition be amended as proposed.

COMMENT SUMMARY: Commenter (4) requested that the definition under paragraph (48) Single Family Housing Unit, explicitly include renters.

STAFF RESPONSE: Staff agreed with commenter and recommended that the definition be amended as proposed.

§20.4. Eligible Single Family Activities. (1)

COMMENT SUMMARY: Commenter (1) was concerned with subsection (c) regarding eligible activities. Commenter does not recommend excluding the rehabilitation of a Mobile Home Unit (MHU) as an eligible Activity means that MHUs will not be eligible simple repairs after a disaster, such as a hurricane.

STAFF RESPONSE: When compared to the cost of replacement, the rehabilitation of an MHU tends to be cost-prohibitive when bringing the unit up to current housing standards. Due to these prohibitive costs, staff believes that MHUs should not be eligible for rehabilitation. However, MHUs will remain eligible for replacement. Therefore, no changes were recommended based on these comments.

§20.6. Applicant Eligibility. (1)

COMMENT SUMMARY: Commenter (1) asked for clarification of subsection (f), concerning the adjustment of award amounts and more information about other factors that the Department will consider when adjusting the award amount.

STAFF RESPONSE: Staff agreed with commenter and recommended an amendment to this section to restrict "other factors" to only those factors similar to feasibility, underwriting analysis or the availability of funds as may be appropriate under the specific circumstances.

COMMENT SUMMARY: Commenter (7) requested more objective, clear, and concise language to avoid potential discrimination and unfair advantages to applicants, with regard to subsection (g) regarding declining applications for activities that do not represent a prudent use of Department funds.

STAFF RESPONSE: Staff believes the proposed language in this section will allow the Department to reject applications that may otherwise meet current applications requirements but, under the circumstances, are not in line with the Department's overall immediate goals. The Department's staff appeal process is available at 10 TAC §1.7. No changes were recommended based on this comment.

§20.10. Inspection Requirements for Construction Activities. (2), (3), (4), (5), (6), (7), and (8)

COMMENT SUMMARY: Commenter (8) requested clarification in subsection (a) regarding which parties will complete the inspection forms.

STAFF RESPONSE: In response to commenter, Forms 11.01 and 11.17 should be completed by the Contract Administrator, not the inspector. The initial inspection report identifies the areas and systems of the housing unit in need of repair in order to prepare a work write-up and cost estimates. No changes were recommended based on this comment.

COMMENT SUMMARY: Commenter (3) requested that under subsection (b)(1), regarding submission of proposed plans and specifications, that plans be approved only once by the Depart-

ment and expressed concerns regarding their distribution due to their proprietary nature.

STAFF RESPONSE: Staff understands the commenter's concerns that plans and specifications should only be submitted once as long as no additional changes are made. To protect the proprietary use of submissions, the Department, through its standard operating procedures, will not provide an architect's or organizational plans to another entity; subject to the requirements of the Texas Public Information Act. Therefore, no changes were recommended based on this comment.

COMMENT SUMMARY: Commenters (3) and (8) expressed concerns under §20.10(b)(4), regarding requirements for a Certificate of Occupancy, that smaller cities do not issue Certificates of Occupancy and may not have a basis for determining whether a unit passes the applicable building code.

STAFF RESPONSE: State law requires that municipalities adopt, at a minimum, the 2000 International Residential Code (IRC), which requires that a Certificate of Occupancy be issued upon completion. Therefore, no changes were recommended based on this comment.

COMMENT SUMMARY: Commenter (1) agreed with subsection (b)(6) regarding cosmetic issues, which will not be required to be corrected for self-help construction programs.

STAFF RESPONSE: Staff appreciated this feedback. No changes were recommended based on this comment.

COMMENT SUMMARY: Commenters (2), (3), (5), and (8) requested under subsection (c) that the Department allow Contract Administrators who have proven qualified inspectors continue to conduct initial and final inspections after September 1, 2014. Commenter (4) requested that the Amy Young Barrier Removal Program be exempt from requiring the use of professional inspectors or qualified inspection individuals and expressed concern that some homes will need a lot of repairs. Commenter stated that the focus of the Amy Young Program should be to address accessibility. Commenters (6) and (7) requested that the Department delay the requirement for certification for all inspections until the Department develops a training and certification program.

STAFF RESPONSE: In response to Commenters (2), (3), (5), (6), (7), and (8), staff recommended the amendment of this subsection to allow professional home inspectors that have received current and comprehensive training to conduct effective inspections. Additionally, staff agreed to remove the September 1, 2014 cutoff deadline for qualified inspectors. While staff understands the concerns of Commenter (4), staff believes that the homes for Persons with Disability in the Amy Yong Barrier Removal Program should meet the same safety and health requirements as other housing units; therefore, no changes were recommended based on this comment.

§20.11. Survey Requirements. (7)

COMMENT SUMMARY: Commenter (7) expressed concerns regarding paragraph (2) regarding the Department's discretion to determine whether additional surveys are required on a per project basis and requested that the rule be more specific.

STAFF RESPONSE: The Department needs the flexibility to require additional surveys on a case-by-case basis, including, but not limited to, situations where we have a pre-improvement survey and determine that an additional survey reflecting construction improvements is necessary. Therefore, no changes were recommended based on this comment.

§20.12. Insurance Requirements for Acquisition Activities. (1)

COMMENT SUMMARY: Commenter (1) requested that the Department reconsider requiring title insurance since title reports are often sufficient, under subsection (a).

STAFF RESPONSE: Staff recommended amending this section to provide the Department flexibility to determine when title insurance will be required through its Program Rules or NOFA.

§20.14. Amendments and Modifications to Written Agreements and Contracts. (1), (7)

COMMENT SUMMARY: Commenter (1) stated that subsection (a), concerning time extensions to contracts, may penalize administrators in the Rio Grande Valley due to hurricanes.

STAFF RESPONSE: The Department will review contract parameters and requirements on a case-by-case basis to ensure administrators have sufficient time to deliver the various activities under their contract. Therefore, no changes were recommended based on this comment.

COMMENT SUMMARY: Commenter (7) expressed that under subsection (c), regarding Award or Contract Reductions, the HOME rehabilitation program should have clear and concise benchmark and appeals criteria based on realistic project times.

STAFF RESPONSE: HOME assistance contracts are effective for a two-year period to allow for the identification of the eligible household and rehabilitation or reconstruction of the dwelling. Benchmark rules were streamlined in 2011 to require submission of the household information within twelve months of the effective date of the contract. Committing the assistance to specific households within the first year of the contract allows time to rehabilitate or reconstruct of the dwelling and close activities within the HUD timelines and deadlines. The 2011 rule changes allow the Department to de-obligate all or part of the awards if the benchmarks are not achieved. This allows us to reallocate funds to entities that are better able to timely expend the funds. The Department's staff appeal process is available under 10 TAC §1.7. Therefore, no changes were recommended based on this comment.

COMMENT SUMMARY: Commenter (1) stated that inclement weather affects costs, so contract administrators should be allowed to access additional funds under subsection (e), regarding Award or Contract Increases.

STAFF RESPONSE: Staff understands that construction costs may increase temporarily after inclement weather events. The Department will review contract increase requests on a case-by-case basis. Therefore, no changes were recommended based on this comment.

COMMENT SUMMARY: Commenter (1) expressed concerns about subsection (h) regarding termination of a contract if benchmarks are not achieved. They noted that delays due to inclement weather events would jeopardize a contract and requested that the Department allow flexibility.

STAFF RESPONSE: Staff believes that this section already provides the flexibility for the Department to respond to delays due to significant weather events, which may be taken into consideration on a case-by-case basis. Therefore, no changes were recommended based on this comment.

The Board approved the final order adopting the new section, as well as non-substantive corrections, on October 9, 2012.

STATUTORY AUTHORITY. The new sections are adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

§20.1. Purpose.

This chapter sets forth the common elements of the Texas Department of Housing and Community Affairs' (the "Department") single family programs, which includes the Department's HOME Investments Partnership Program (HOME), Texas Housing Trust Fund (HTF), Bond/First Time Homebuyer (FTHB), Taxable Mortgage Program (TMP), Texas Neighborhood Stabilization (NSP), and Office of Colonia Initiatives (OCI) Programs and other Single Family Programs as developed by the Department. Single family programs are designed to improve and provide affordable housing opportunities to low-income individuals and families in Texas and in accordance with Texas Government Code, Chapter 2306 and any applicable statutes and federal regulations.

§20.3. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings unless the context or the Notice of Funding Availability (NOFA) indicates otherwise. Other definitions may be found in Texas Government Code, Chapter 2306 and Chapter 1 of this title (relating to Administration).

(1) Activity--A form of assistance provided to a Household or Administrator by which single family funds are used for acquisition, new construction, reconstruction, rehabilitation, refinance of an existing mortgage or tenant-based rental assistance for single family housing.

(2) Administrator--A unit of local government, nonprofit corporation or other entity who has an executed written Agreement or Contract with the Department.

(3) Agreement--Same as "Contract." May be referred to as a "Reservation System Agreement" or "Reservation Agreement" when providing access to the Department's reservation system as defined in this chapter.

(4) Amortized--A loan in which the principal as well as the interest, if applicable, is payable monthly or in some other periodic installment over the term of the loan.

(5) Annual Income--The definition of Annual Income and the methods utilized to establish eligibility for other types of housing assistance as defined under the Program Rule.

(6) Applicant--An individual, unit of local government, nonprofit corporation or other entity who has submitted to the Department an Application for Department funds or other assistance.

(7) Application--A request for a contract award or to participate in a reservation system submitted to the Department in a form prescribed by the Department, including any exhibits or other supporting material.

(8) Chapter 2306--Texas Government Code, Chapter 2306.

(9) Combined Loan to Value (CLTV)--The aggregate principal balance of all the mortgage loans, including Forgivable Loans, divided by the appraised value.

(10) Competitive Application Cycle--A defined period of time that Applications may be submitted according to a published Notice of Funding Availability (NOFA) that will include a submission deadline and selection or scoring criteria.

(11) Conforming Mortgage Loan--A first-lien loan that meets Federal Housing Administration (FHA), U.S. Department of Agriculture (USDA), U.S. Department of Veterans Affairs (VA), and Fannie Mae or Freddie Mac guidelines.

(12) Contract--The executed written Agreement between the Department and an administrator performing an Activity related to a single family program that describes performance requirements and responsibilities assigned by the document. May also be referred to as "agreement."

(13) Contract Administrator (CA)--Same as "Administrator."

(14) Deferred Payment Loan--Any loan which includes deferral of payments.

(15) Deobligate--The cancellation or release of funds as a result of the termination or reduction of a Contract or Agreement between the Department and the Administrator.

(16) Department--The Texas Department of Housing and Community Affairs as defined in Chapter 2306.

(17) Developer--Any person, general partner, or affiliate of a person who owns or proposes a Development or expects to acquire control of a Development and is the person responsible for performing under the contract with the Department.

(18) Domestic Farm Laborer--Individuals (and the family) who receive a substantial portion of their income from the production or handling of agricultural or aquacultural products.

(19) Draw--Funds requested by the Administrator, approved by the Department and subsequently disbursed to the Administrator.

(20) Executive Director--Director of the Department, as defined in Chapter 2306.

(21) Forgivable Loan--Financial assistance in the form of money that, by Agreement, is not required to be repaid if the terms of the mortgage loan are met.

(22) HOME Program--HOME Investment Partnerships Program at 42 U.S.C. §§12701 - 12839.

(23) Household--One or more persons occupying a rental unit or owner-occupied Single Family Housing Unit. May also be referred to as a "family."

(24) Housing Contract System (HCS)--The electronic information system established by the Department to be used for tracking, funding, and reporting single family contracts and activities.

(25) HUD--The United States Department of Housing and Urban Development or its successor.

(26) Life of Loan Flood Certification--Tracks the flood zone of the Single Family Housing Unit for the life of the loan.

(27) Loan--Same as "mortgage loan as defined in Chapter 2306."

(28) Loan Assumption--An Agreement between the buyer and seller of Single Family Housing Unit that the buyer will make remaining payments and adhere to terms and conditions of an existing mortgage loan on the Single Family Housing Unit and program requirements. A mortgage loan assumption requires Department approval.

(29) Loan to Value (LTV)--The amount of the mortgage loan(s) divided by the Single Family Housing Unit's appraised value, excluding Forgivable Loans.

(30) Manufactured Housing Unit (MHU)--A structure that meets the requirements of Texas Manufactured Housing Standards Act, Texas Occupations Code, Chapter 1201 or FHA guidelines as required by the Department.

(31) Nonconforming Mortgage Loan--Any mortgage loan that does not meet the definition of a "Conforming Mortgage Loan" defined in paragraph (11) of this section.

(32) Neighborhood Stabilization Program (NSP)--A HUD-funded program authorized by HR3221, the "Housing and Economic Recovery Act of 2008" (HERA) and §1497 of the Wall Street Reform and Consumer Protection Act of 2010, as a supplemental allocation to the CDBG Program.

(33) NOFA--Notice of Funding Availability.

(34) Nonprofit Organization--An organization that is organized as such under state or federal laws and does not have a pending Application for nonprofit status.

(35) Open Application Cycle--A defined period of time in which Applications may be submitted according to a published NOFA and which will be reviewed on a first-come, first-served basis until the NOFA is closed.

(36) Parity Lien--A lien position whereby two or more lenders share a security interest of equal priority in the collateral.

(37) Persons with Disabilities--Any person who has a physical or mental impairment that substantially limits one or more major life activities and has a record of such impairment; or is regarded as having such impairment.

(38) Principal Residence--The primary Single Family Housing Unit that a Household inhabits. May also be referred to as "primary residence."

(39) Program--The specific fund source from which single family funds are applied for and used.

(40) Program Income--Gross income received by the Administrator directly generated from the use of Single Family funds.

(41) Program Manual--A set of guidelines designed to be an implementation tool for the single family programs which allows the Administrator to search for terms, statutes, regulations, forms and attachments. The program manual is developed by the Department and amended or supplemented from time-to-time.

(42) Program Rule--Chapters of this title which pertain to specific single family program requirements.

(43) Reconstruction--The demolition and rebuilding a Single Family Housing Unit on the same lot in substantially the same manner. The number of housing units may not be increased; however, the number of rooms may be increased or decreased dependent on the number of family members living in the housing unit at the time of Application. Reconstruction includes replacing existing, sub-standard MHUs with a new MHU or site built house. MHUs must be installed according to the manufacturer's installation instructions and in accordance with state laws and regulations.

(44) Reservation--Funds set-aside for a Household Applicant or single family activity registered in the Department's registration system.

(45) Reservation System--The Department's computer registration system(s) that allows Administrators to reserve funds for a specific Household.

(46) Resolution--Formal action by a corporate board of directors or other corporate body authorizing a particular act, transaction, or appointment. Resolutions must be in writing and state the specific action that was approved and adopted, the date the action was approved and adopted, and the signature of person or persons authorized to sign resolutions. Resolutions must be approved and adopted in accordance with the corporate bylaws.

(47) Self-Help--Housing programs that allow low, very low, and extremely low-income families to build or rehabilitate their Single Family Housing Units through their own labor or volunteers.

(48) Single Family Housing Unit--A home designed and built for one person or one Household for rental or owner-occupied. This includes the acquisition, construction, reconstruction or rehabilitation of an attached or detached unit. May be referred to as a single family "home," "housing," "property," "structure," or "unit."

(49) Soft costs--Costs related to and identified with a specific Single Family Housing Unit other than construction costs. May also be referred to as "direct delivery" costs.

(50) Subgrantee--Same as "Administrator."

(51) Subrecipient--Same as "Administrator."

(52) TAC--Texas Administrative Code.

(53) TREC--Texas Real Estate Commission.

§20.6. Applicant Eligibility.

(a) Eligible Applicants may include entities such as units of local governments, nonprofit corporations, or other entities as further provided in the Program Rules and/or NOFA.

(b) Applicants shall be in good standing with the Texas Office of the Secretary of State and Texas Comptroller of Public Accounts, as applicable.

(c) Applicants shall comply with all applicable state and federal rules, statutes, or regulations.

(d) Resolutions must be provided in accordance with the applicable Program Rule or NOFA.

(e) The violations described in paragraphs (1) - (5) of this subsection may cause an Applicant and any Applications they have submitted, to be ineligible:

(1) Applicant did not satisfy all eligibility requirements described in the Program Rules and NOFA to which they are responding;

(2) Applicant failed to make timely payment on fee commitments or on debts to the Department and for which the Department has initiated formal collection or enforcement actions;

(3) Applicant failed to comply with any other provisions of debt instruments held by the Department including, but not limited to, such provisions as timely payment of property taxes and proper placement and maintenance of insurance;

(4) Applicant is debarred by HUD or the Department; or

(5) current or previous noncompliance. Each Applicant will be reviewed for compliance history by the Department. Applications submitted by Applicants found to be in material noncompliance or otherwise violating the Compliance Rules of the Department may be terminated and/or not recommended for funding.

(f) The Department reserves the right to adjust the amount awarded based on the Application's feasibility, underwriting analysis, the availability of funds, or other similar factors as deemed appropriate by the Department.

(g) The Department may decline to fund any Application if the proposed activities do not, in the Department's sole determination, represent a prudent use of the Department's funds. The Department is not obligated to proceed with any action pertaining to any Applications which are received, and may decide it is in the Department's best interest to refrain from pursuing any selection process. The Department reserves the right to negotiate individual elements of any Application.

§20.10. Inspection Requirements for Construction Activities.

(a) Initial Inspections.

(1) An initial inspection report must be provided to both the Department and the homeowner or homebuyer for all construction projects. A rehabilitation project is eligible for Reconstruction if the initial inspection report estimates that the cost to rehabilitate exceeds the rehabilitation threshold, which shall be $40,000, or the pre-rehabilitation value of the structure to be rehabilitated, whichever is less.

(2) All deficiencies identified in the initial inspection report shall be addressed in the work write-up for rehabilitation projects.

(b) Construction Completion Requirements and Final Inspections.

(1) Compliance with Accessibility Requirements--Applicant must submit one of the documents described in subparagraph (A) or (B) of this paragraph to ensure that requirements of Texas Government Code, §2306.514 and other Program Rules are met.

(A) A copy of the proposed plans and specifications for Reconstruction and New Construction of Single Family Units. All plans submitted must be prepared and executed by an architect licensed by the state of Texas; or

(B) A certification of compliance which includes the seal of the architect.

(2) Final inspections are required for all rehabilitation, reconstruction or new construction activities and must ensure that the construction on the Single Family Housing Unit is complete and meets all applicable state and local codes, and have no observed deficiencies related to health and safety standards.

(3) A copy of the final inspection report must be provided to the Department and the Household for rehabilitation, reconstruction and new construction activities.

(4) A Certificate of occupancy shall be issued prior to final payment for construction, as applicable. If no certificate of occupancy is available from an incorporated area, a document from the local government entity showing that the Single Family Housing Unit has passed all required building codes must be obtained and provided to the Department.

(5) Any deficiencies noted on the certificate of occupancy or the inspector's report must be corrected prior to the final Draw.

(6) Cosmetic issues such as paint, wall texture, etc. will not be required to be corrected if utilizing a self-help construction program.

(c) Requirements for Use of professional inspectors or qualified inspection individuals.

(1) Professional home inspectors or qualified inspection individuals shall conduct all initial and final inspections for new construction, reconstruction and rehabilitation activities utilizing the Department's single family program funds.

(2) Municipal code officials, as applicable, shall conduct inspections inside of city limits and extraterritorial jurisdictions.

(3) Professional home inspector requirements.

(A) Inspections may be conducted by a professional home inspector as evidenced by the Administrator to ensure inspections are performed by a person who has received current and comprehensive training to enable them to conduct effective inspections. Completion of the training required to be a licensed TREC inspector would be acceptable evidence of such training.

(B) The professional home inspector may be a staff member of the Administrator.

(4) Qualified inspection individual Requirements.

(A) Inspections may be conducted by a qualified inspection individual if certified by the Administrator that the individual has professional certifications, relevant education or minimum five (5) years experience in a field directly related to home inspection, including but not limited to installing, servicing, repairing or maintaining the structural, mechanical, plumbing and electrical systems found in Single Family Housing Units, as evidenced by inspection logs, certifications, training courses or other documentation.

(B) Inspections may be performed by qualified inspection individuals if allowed by the Program Rules or NOFA.

(C) Qualified inspection individuals may be a staff member of the Administrator.

(d) Other inspection requirements.

(1) All inspectors shall inspect properties utilizing applicable construction standards prescribed by the Department; and

(2) All inspectors shall utilize Department approved and prescribed inspection forms/checklists for applicable inspections.

(e) Single Family Housing Units receiving only utility connections under the Colonia Self Help Center Program are exempt from inspection requirements.

§20.11. Survey Requirements.

When assistance is provided in the form of an acquisition mortgage loan:

(1) a Category 1A (Texas Society of Professional Surveyors) land title survey is required for single family acquisition where:

(A) the Department is the first lien holder and the rehabilitation activity funds are used for construction because:

(i) the Rehabilitation project is enlarging the footprint; or

(ii) the project is Reconstruction or New Construction; and

(B) if allowed by the Program Rules or NOFA, existing surveys for acquisition only activities may be used if the Household certifies that no changes were made to the footprint of any building or structure, or to any improvement on the Single Family Housing Unit;

(2) the Department reserves the right to determine the survey requirements on a per project basis if additional survey requirements would, at the sole discretion of the Department, benefit the project.

§20.12. Insurance Requirements for Acquisition Activities.

(a) Title Insurance requirements. A Mortgagee's Title Insurance Policy is required for all non-conforming Department mortgage loans as required by the Program Rules or NOFA, exclusive of loans financed with mortgage revenue bonds or through the Taxable Mortgage Program. The title insurance must be written by a title insurer licensed or authorized to do business in the jurisdiction where the Single Family Housing Unit is located. The policy must be in the amount of the

loan. The Mortgagee named shall be: "Texas Department of Housing and Community Affairs."

(b) Title Reports.

(1) Title reports may be provided in lieu of title insurance only for grants if title insurance is not available. Title reports shall be required when the grant funds exceed $20,000.

(2) The preliminary title report may not be older than allowed by the Program Rules or NOFA.

(3) Liens, or any other restriction or encumbrances that impair the good and marketable nature of the title must be cleared on or before closing of the Department's transaction.

(c) Builder's Risk (non-reporting form only) is required where construction of the Single Family Housing Unit is being financed by the Department in an amount not less than the cost of construction. At the end of the construction period, the binder must be endorsed to remove the "pending disbursements" clause.

(d) Hazard Insurance.

(1) The hazard insurance provisions are not applicable to HOME Program activities unless required in the Program Rule.

(2) If Department funds are provided in the form of a loan, then:

(A) the Department requires property insurance for fire and extended coverage;

(B) Homeowner's policies or package policies that provide property and liability coverage are acceptable. All risk policies are acceptable;

(C) the amount of hazard insurance coverage at the time the mortgage loan is funded should be no less than 100 percent of the current insurable value of improvements; and

(D) the Department should be named as a loss payee and mortgagee on the hazard insurance policy.

(e) Flood insurance must be maintained for all structures located in special flood hazard areas where the U.S. Federal Emergency Management Agency (FEMA) has mandated flood insurance coverage.

(1) A Household may elect to obtain flood insurance even though flood insurance is not required. However, the Household may not be coerced into obtaining flood insurance unless it is required in accordance with this section.

(2) Evidence of insurance, as required in this chapter, must be obtained prior to mortgage loan funding. Insurance premiums for at least twelve (12) months and up to two (2) months of reserves may be collected at loan closing. The Department must be named as loss payee on the policy.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 12, 2012.

TRD-201205326

Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: November 1, 2012
Proposal publication date: August 10, 2012
For further information, please call: (512) 475-3916

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CHAPTER 23. SINGLE FAMILY HOME PROGRAM

SUBCHAPTER A. GENERAL GUIDANCE

10 TAC §23.1, §23.2

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 23, Subchapter A, §23.1 and §23.2, concerning General Guidance. Section 23.2 is adopted with changes to the proposed text as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5912). Section 23.1 is adopted without changes and will not be republished.

REASONED JUSTIFICATION. The Department recently underwent a reorganization which separated the HOME Division into single family and multifamily areas. The 2010 HOME rule at 10 TAC Chapter 53 did not allow for the single family and multifamily areas to effectively administer their activities with autonomy. Additionally, the Single Family HOME rules required updates which aligned more closely with the other Single Family programs, and new 10 TAC Chapter 20 specifically. Therefore, a repeal of portions of the HOME Rule at 10 TAC Chapter 53 and an adopted new Single Family HOME Program at 10 TAC Chapter 23 were necessary.

The Department accepted public comments between August 10, 2012 and September 10, 2012. Comments regarding the new sections were accepted in writing and by fax. No comments were received concerning the new sections; however, non-substantive minor clerical corrections to references and punctuation were recommended.

The Board approved the final order adopting the new sections, including non-substantive technical corrections, on October 9, 2012.

STATUTORY AUTHORITY. The new sections are adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

§23.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Other definitions may be found in Texas Government Code, Chapter 2306 or Chapter 20 of this title (relating to Single Family Programs Umbrella Rule).

(1) Affiliated Party--A Person with a contractual relationship with the Contract Administrator on a Contract with the Department.

(2) Application Submission Procedures Manual (ASPM)--The manual that sets forth the procedures, forms, and instructions for the completion and submission of an Application to the Department.

(3) CFR--Code of Federal Regulations.

(4) Commitment of Funds--Occurs when the Activity or a Project is approved by the Department and set up in the disbursement

and information system established by U.S. Department of Housing and Urban Development (HUD).

(5) Control--The possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership or voting securities, by contract or otherwise, including ownership of more than 50 percent of the General Partner interest in a limited partnership, or designation as a managing member of a limited liability company or managing General Partner of a limited partnership or any similar member.

(6) Development Site--The area, or if scattered site, areas on which the Development is proposed to be located.

(7) Direct Project Costs--The total of hard construction costs, demolition costs, aerobic septic systems, refinancing costs (as applicable), acquisition and closing costs, rental and utility subsidy and deposits, and Match funds.

(8) General Requirements--An allowance for the General Contractor's on-site overhead expenses. General Requirements shall be limited as prescribed in Chapter 10, Subchapter D of this title (relating to Underwriting and Loan Policy) and must follow the standards published by the Construction Specifications Institute.

(9) HOME Final Rule--The regulations with amendments promulgated at 24 CFR, Part 92 as published by HUD for the HOME Investment Partnerships Program at 42 U.S.C. §§12701 - 12839.

(10) Match--Funds contributed to a Project that meet the requirements of 24 CFR §§92.218 - 92.220. Match contributed to a Project or Activity does not include mortgage revenue bonds, HOME-match eligible projects, and cannot include any other sources of Department funding unless otherwise approved in writing by the Department.

(11) Person--Any individual, partnership, corporation, association, unit of government, community action agency, or public or private organization of any character.

(12) Persons with Special Needs--Individuals or categories of individuals determined by the Department to have unmet housing needs consistent with 42 U.S.C. §§12701, et seq. and as provided in the Consolidated Plan and may include any Households composed of one or more persons with alcohol and/or drug addictions, Colonia residents, Persons with Disabilities, elderly, victims of domestic violence, persons with HIV/AIDS, homeless populations, migrant farm workers, and public housing residents.

(13) Predevelopment Costs--Costs related to a specific eligible Project including:

(A) Predevelopment housing project costs that the Department determines to be customary and reasonable, including but not limited to consulting fees, costs of preliminary financial applications, legal fees, architectural fees, engineering fees, engagement of a development team, and site control;

(B) Pre-construction housing project costs that the Department determines to be customary and reasonable, including but not limited to, the costs of obtaining firm construction loan commitments, architectural plans and specifications, zoning approvals, engineering studies and legal fees; and

(C) Predevelopment costs do not include general operational or administrative costs.

(14) Principal--A Person, or Persons, that will exercise Control over a partnership, corporation, limited liability company, trust, or any other private entity. In the case of:

(A) Partnerships: Principals include all General Partners, special limited partners, and Principals with ownership interest;

(B) Corporations: Principals include any officer authorized by the board of directors to act on behalf of the corporation, including the president, vice president, secretary, treasurer, and all other executive officers, and each stock holder having a 10 percent or more interest in the corporation; and

(C) Limited liability companies: Principals include all managing members, members having a 10 percent or more interest in the limited liability company or any officer authorized to act on behalf of the limited liability company.

(15) Project--A single housing unit with a unique physical address. A Project may also refer to an individual Project, Development, or site.

(16) Reservation System Participant (RSP)--Administrator whose executed written agreement allows for participation in the Reservation System.

(17) Service Area--The city(ies), county(ies) and/or place(s) identified in the Application and/or Contract that the CA or RSP will serve.

(18) Texas Minimum Construction Standard (TMCS)--The program standard used to determine the minimum acceptable housing condition for the purposes of rehabilitation, new construction, and acquisition.

(19) Third Party--A Person who is not:

(A) an Applicant, CA, RSP, Borrower, General Partner, Developer, Development Owner, or General Contractor; or

(B) an Affiliate, Affiliated Party to the Applicant, CA, Borrower, General Partner, Developer, Development Owner, or General Contractor; or

(C) a Person receiving any portion of the administration, contractor fee, or developer fee.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 11, 2012.

TRD-201205304
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: October 31, 2012
Proposal publication date: August 10, 2012
For further information, please call: (512) 475-3916

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SUBCHAPTER B. AVAILABILITY OF FUNDS, APPLICATION REQUIREMENTS, REVIEW AND AWARD PROCEDURES, GENERAL ADMINISTRATIVE REQUIREMENTS, AND RESALE AND RECAPTURE OF FUNDS

10 TAC §§23.20 - 23.29

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 23, Subchapter B, §§23.20 - 23.29, concerning Availability of Funds, Application Requirements, Review and Award Procedures, General Administrative Requirements, and Resale and Recapture of Funds. Sections 23.21, 23.22, 23.24, 23.25, and 23.27 - 23.29 are adopted with changes to the proposed text as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5914). Sections 23.20, 23.23, and 23.26 are adopted without changes and will not be republished.

REASONED JUSTIFICATION. The Department recently underwent a reorganization which separated the HOME Division into single family and multifamily areas. The 2010 HOME rule at 10 TAC Chapter 53 did not allow for the single family and multifamily areas to effectively administer their activities with autonomy. Additionally, the Single Family HOME rules required updates which aligned more closely with the other Single Family programs, and new 10 TAC Chapter 20 specifically. Therefore, a repeal of portions of the HOME Rule at 10 TAC Chapter 53 and an adopted new Single Family HOME Program at 10 TAC Chapter 23 were necessary.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

In addition to the summary of public comment and staff response, the adopted sections, include administrative clarifications and minor clerical corrections to references and punctuation. After each comment title, numbers are shown in parentheses. These numbers refer to the person or entity that made the comment. If comment resulted in recommended language changes to the proposed rule as presented to the Board in July, such changes are indicated.

Comments were accepted from August 10, 2012 through September 10, 2012, with comments received from: (1) Langford Community Management Services, Inc; (2) GrantWorks, Inc.; (5) Resource Management and Consulting Co; (7) Hunter and Hunter Consultants, Inc., (10) Disability Advisory Workgroup; and (11) Easter Seals.

GENERAL COMMENTS: Chapter 23 - No specific part of the proposed rule referenced in comment. (10), (11)

COMMENT SUMMARY: Commenters (10) and (11) suggested that flexibility should be incorporated into the HOME rules to allow the Director the ability to waive rules or approve modifications to the rules whenever necessary.

STAFF RESPONSE: Delegation of authority to the HOME Director to waive the HOME rules is beyond the legal authority of the Board. No changes were recommended based on these comments.

§23.25(a). Project Fund Limits. (2)

COMMENT SUMMARY: Commenter (2) recommended increasing the contract cap from $500,000 to $510,000 to allow an even number of units to be assisted with the proposed maximum cap per dwelling of $85,000.

STAFF RESPONSE: Staff agreed and recommended increasing the contract cap from $500,000 to $510,000.

§23.26(b). Limits on Numbers of Reservations. (5)

COMMENT SUMMARY: Commenter (5) recommended the elimination of the limitation of working Homeowner Rehabilitation, Homebuyer Assistance or Single Family Development reservations for a Reservation System Participant (RSP) to five per county and thirty of Tenant-Based Rental Assistance reservations within the RSP's Service Area at any given time.

STAFF RESPONSE: The restriction is in place to control the number of incomplete reservations promoting more active use of funds. The restriction only applies to those in the status of Pending Approval. An additional reservation activity may be entered into the system once the process is complete and the status transfers from Pending Approval to Active. No changes were recommended based on these comments.

§23.26(e). Completion of Construction. (5)

COMMENT SUMMARY: Commenter (5) indicated that nine months is not enough time to complete construction and recommends completion of construction be extended to twelve months of the commitment of funds under the RSP agreement.

STAFF RESPONSE: Staff agreed that the time necessary to execute grant documents and demolition can delay the start of construction and through, the RSP agreement, TDHCA allows for one three-month extension to allow for any delays prior to start of construction. No changes were recommended based on these comments.

§23.28(12). Deficiency Cure Period. (2)

COMMENT SUMMARY: Commenter (2) requested additional time to resolve deficiencies, beyond the 10 business days allowed, if the Administrator can demonstrate they are proactively working on resolution.

STAFF RESPONSE: The Single Family Loan Process has recently been restructured to improve consistency, reduce delays and improve processes and response times for all single family programs and activities. The intent of the process and the requirement is to reduce the time it takes to process applications for assistance and loan closings. Applicants for HOME activities are allowed to be re-submitted for approval when the deficiency is corrected if it takes longer than 10 business days to correct. No changes were recommended based on these comments.

§23.28(15). Project Completion Reports. (1), (7)

COMMENT SUMMARY: Commenters (1) and (7) requested the Project Completion Report be submitted within 60 days after completion of the dwelling rather than 30 days to accommodate dating of lien waivers and other documentation.

STAFF RESPONSE: Staff agreed with Commenter and recommended an amendment to the submission date from 30 days to the recommended 60 days after the completion date of the unit. Failure to submit completion reports within 120 days of completion of the project will result in HUD restricting the Department from setting up new activities or committing HOME funds.

§23.29(d). Homeowner Affordability Period. (1), (2)

COMMENT SUMMARY: Commenters (1) and (2) suggested forgiveness of the loan/grant upon death of a homeowner assisted with HOME Homeowner Rehabilitation Program when no federal affordability period is required.

STAFF RESPONSE: These resale and recapture provisions are the same provisions as provided in the Action Plan that has been approved by HUD. No changes were recommended based on these comments.

The Board approved the final order adopting the new sections, including non-substantive technical corrections, on October 9, 2012.

STATUTORY AUTHORITY. The new sections are adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

§23.21. Application Forms and Materials and Deadlines.

(a) The Department will develop and publish an Application, which if completed by an eligible Applicant, would satisfy the requirements for requesting funds from the Department. The Department will also issue an Application Submission Procedures Manual (ASPM) to provide guidance on proper completion of the Application.

(b) Applicants must submit an Application for a Contract award by the deadline date specified in the NOFA. All Applications must be received during business hours, Monday through Friday, 8:00 a.m. - 5:00 p.m., except for observed holidays.

§23.22. Contract Award Application Review Process.

(a) An Application received by the Department in response to an Open Application Cycle NOFA will be assigned a "Received Date" based on the date it is received by the Division. An Application will be prioritized for review based on its "Received Date." An Application with outstanding Administrative Deficiencies may be held from further review until all Administrative Deficiencies have been cured. Applications that have completed the review process may be presented to the Board for approval with priority over Applications that continue to have Administrative Deficiencies at the time Board materials are prepared, regardless of Received Date. If all funds available under a NOFA are awarded, all remaining Applicants will be notified and the remaining Applications will not be processed.

(b) For Applications received by the Department in response to a Competitive Application Cycle NOFA, the Department will accept Applications on an ongoing basis during the application acceptance period as specified in the NOFA. Applications will be prioritized for review based upon the score of the Application.

(c) An Administration Deficiency may not be cured if it would require substantially changing an Application or if the Applicant provides any new unrequested information to cure the Deficiency. An Applicant may not change or supplement any part of an Application in any manner after submission to the Department, and may not add any set-asides, increase the award request amount, or revise the unit mix (both income levels and bedroom mixes), except in response to a direct request from the Department to remedy an Administrative Deficiency as further described in this chapter or by amendment of an Application after the Board approval of a HOME award. The curative time periods allowable for Administrative Deficiencies are: for Applications received under an Open Application Cycle NOFA, Administrative Deficiencies not cured within five (5) business days will be terminated. Applicants that have been terminated may reapply for funds; or for Applications received under a Competitive Application Cycle NOFA, if Administrative Deficiencies are not cured to the satisfaction of the Department within five (5) business days of the deficiency notice date, then five (5) points shall be deducted from the selection score for each additional day the Administrative Deficiency remains unresolved. If Administrative Deficiencies are not clarified or corrected within seven (7) business days from the deficiency notice date, then the Application shall be terminated. An Applicant may not adjust the self-score without a request from the Department as a result of an Administrative Deficiency.

§23.24. General Threshold and Selection Criteria.

All Applicants and Applications must submit or comply with:

(1) an Applicant certification of compliance with state and federal laws, rules and guidance governing the HOME Program;

(2) a resolution signed and dated within the six (6) months preceding the Application submission date from the Applicant's direct governing body which includes:

(A) authorization of the submission of the Application;

(B) commitment and amount of cash reserves, if applicable, for use during the Contract or RSP agreement term;

(C) source of funds for Match obligation and Match dollar amount, if applicable;

(D) name and title of the person authorized to represent the organization; and

(E) signature authority to execute a contract;

(3) any Applicant requesting $25,000 or more must be registered in the federal Central Contractor Registration (CCR) and have a current Data Universal Numbering System (DUNS) number. Applicants requesting funds for multifamily housing development and that are "to-be-formed" are not required to submit a CCR or DUNS number until after award but prior to Contract execution. If the property will be owned by a partnership, the partnership must be the registrant. If a partnership will be receiving funds under the CHDO set-aside, the partnership and the CHDO must both be registered;

(4) an Application fee, to be defined in the NOFA;

(5) to be eligible for a new Contract award, an Applicant must have committed funds to at least 80 percent of the total number of contractually required Households or has committed at least 80 percent of the total Project funds on their current Contract for the same Activity. This provision shall not apply to Applications submitted for disaster relief funding or those with an exclusively different Service Area;

(6) an Application must be substantially complete when received by the Department. An Application will be terminated if an entire volume of the Application is missing; has excessive omissions of documentation from the threshold or selection criteria or uniform Application documentation; or is so unclear, disjointed, or incomplete that a thorough review cannot reasonably be performed by the Department, as determined by the Department. Such Application will be terminated without being processed as an Administrative Deficiency. To the extent that a review was able to be performed, specific reasons for the Department's termination will be included in the notification sent to the Applicant but, because of the suspended review, may not include an all inclusive list of deficiencies in the Application; and

(7) the Department may incentivize or provide preference to Applicants targeting very low and extremely low income Households or to Applicants that have successfully executed a previous HOME Contract with the Department. Such incentives may be established in the form of threshold or selection criteria in the NOFA and may be different for each Activity.

§23.25. Contract Award Limitations.

(a) Project Funds Limits. Project funds for Contract awards are limited to $510,000 per Contract Administrator for Homeowner Rehabilitation and Contract for Deed Conversion Activity Applicants and $300,000 per Contract Administrator for Homebuyer Assistance and Tenant-Based Rental Assistance Activity Applicants. The Contract award limits for Project funds for Single Family Development Activity Applicants will be established in the NOFA for these Activities.

(b) Contract Award Terms. With the exception of Tenant-Based Rental Assistance, all Activity Contract awards will have a Contract term of twenty-four (24) months exclusive of any applicable

affordability period or loan term. Tenant-Based Rental Assistance Activity Contract awards will have a Contract term of thirty-six (36) months.

(c) Contract Award Benchmarks. All Contract Administrators must submit to the Department complete Project setup information for the Commitment of Funds of all contractually required Households in accordance with the requirements herein within twelve (12) months from the effective date of the Contract. All remaining funds will be automatically deobligated and returned to the Department unless an amendment has been requested in writing prior to this date and is approved.

(d) Voluntary Deobligation. The Contract Administrator may fully deobligate funds in the form of a written request signed by the signatory, or successor thereto, of the Contract. The Contract Administrator may partially deobligate funds under a Contract in the form of a written request from the signatory if the letter also deobligates the associated number of targeted Households, funds for Administrative costs, and Match and the partial deobligation would not have impacted the award of the Contract.

(e) The Department may request information regarding the performance or status under a Contract prior to a Contract benchmark or at various times during the term of a Contract. Contract Administrator must respond within the time limit stated in the request. Prolonged or repeated failure to respond may result an Administrative Deficiency and ultimately in termination of the Contract by the Department.

(f) Pre-Award Costs. Before the effective date of the HOME Contract, the Contract Administrator may incur and be reimbursed for travel costs, as provided for with Administrative funds, related to mandatory training required by the Department as a condition of receiving a HOME award and Contract. Department authorized pre-award costs for predevelopment costs, including but not limited to legal, architectural, engineering, appraisal, surveying, environmental, and market study fees, may be paid if incurred before the effective date of the Contract if the costs are in accordance with 24 CFR §92.212 and at the sole discretion of the Department.

§23.27. Procurement of Contractor.

The Department may procure a contractor or contractors to provide services for the administration of the HOME Program. A contractor must provide services and/or administer HOME funds in accordance with state and federal rules and the program requirements of this chapter for the applicable Activity.

§23.28. General Administrative Requirements.

Unless otherwise provided in this chapter, the CA, RSP, or Development Owner, must comply with the requirements described in paragraphs (1) - (18) of this section, for the administration and use of HOME funds:

(1) complete training, as applicable;

(2) provide all applicable Department Housing Contract System access request information and documentation requirements;

(3) establish and maintain sufficient records at its regular place of business and make available for examination by the Department, HUD, the State Auditor of Texas, the U.S. General Accounting Office, the Comptroller of Public Accounts of the State of Texas, and the U.S. Comptroller, or any of their duly authorized representatives;

(4) for non-development Activities, develop and establish written procurement procedures that comply with federal, state, and local procurement requirements including:

(A) develop and comply with written procurement selection criteria and committees;

(B) develop and comply with a written code of conduct governing employees, officers, or agents engaged in administering HOME funds and appoint a procurement officer to manage any bid process;

(C) ensure consultant or any procured service provider does not participate in or direct the process of procurement for services. A consultant cannot assist in their own procurement before or after an award is made;

(D) ensure that procedures established for procurement of building construction contractors do not include requirements for the provision of general liability insurance coverage in an amount to exceed the value of the contract;

(E) ensure that building construction contractors are procured using a formal sealed bid procedure for single family New Construction, Reconstruction or Rehabilitation Projects;

(F) ensure that professional service providers (consultants) are procured using an open competitive procedure and are not procured based solely on the lowest priced bid; and

(G) ensure that any Request for Proposals or Invitation for Bid include:

(i) an equal opportunity disclosure and a notice that bidders are subject to search for listing on the Excluded Parties List;

(ii) bidders' protest rights and an outline of the procedures bidders must take to address procurement related disputes;

(iii) a conflict of interest disclosure;

(iv) a clear and accurate description of the technical requirements for the material, product, or service to be procured. The description must include complete, adequate, and realistic specifications;

(v) for sealed bid procedures, disclose the date, time and location for public opening of bids and indicate a fixed-price contract; and

(vi) for competitive proposals, disclose the specific selection/evaluation criteria;

(5) in instances where potential conflict of interest exists, follow procedures to submit a request to the Department to grant an exception to any conflicts prohibited by 24 CFR §92.356. The request submitted to the Department must include a disclosure of the nature of the conflict, accompanied by an assurance that there has been public disclosure of the conflict by newspaper publication and a description of how the public disclosure was made. No HOME funds will be committed to or reserved to assist a Household until HUD has granted an exception to the conflict of interest provisions;

(6) perform environmental clearance procedures, as required, before acquiring any Property or before performing any construction activities, including demolition, or before the occurrence of the loan closing, if applicable;

(7) develop and comply with written applicant intake and selection criteria for program eligibility and promote and comply with Fair Housing requirements;

(8) complete applicant intake and applicant selection. Notify each applicant Household in writing of either acceptance or denial of HOME assistance within sixty (60) days following receipt of the intake application. For Homeowner Rehabilitation Assistance and Contract for Deed Conversion the CA or RSP must:

(A) provide Rehabilitation as an available option to Households, provide Households with a general cost estimate, and to the extent that Rehabilitation would not meet the program requirements, explain these program requirements;

(B) unless not allowed by local code, provide replacement of an existing housing unit with a new MHU as an available option; and

(C) explain relocation as an available option to any Households located within the 100-year floodplain and present the costs associated with flood insurance;

(9) determine the income eligibility of a Household using the "Annual Income" as defined at 24 CFR §5.609;

(10) except for Single Family Development, complete an updated income eligibility determination of a Household if more than six (6) months has elapsed from the date of certification and the date the HOME assistance is provided to the Household. For Single Family Development, complete income eligibility determination of a Household if more than six (6) months has elapsed from the date of certification and the date the contract to purchase the housing unit is executed with the Household;

(11) for single family Activities involving construction, perform initial inspection in accordance with Chapter 20 of this title (relating to Single Family Programs Umbrella Rule) and at least four (4) progress inspections. Property inspections must include photographs of the front and side elevation of the housing unit and at least one picture of the kitchen, family room, one of the bedrooms and one of the bathrooms. The inspection must be signed and dated by the inspector and CA or RSP;

(12) submit requests for the Commitment or Reservation of Funds, loan closing preparation, and disbursements and all required information and verification documentation in the Housing Contract System. A request will not be reviewed by the Department until the CA, RSP, or Development Owner has submitted all required documentation. If, during review, the Department identifies Administrative Deficiencies, the Department will allow a cure period of ten (10) business days beginning at the start of the first business day following the date the CA, RSP or Development Owner is notified of the deficiency. If any Administrative Deficiency remains after the cure period, the Department, in its sole discretion, shall disapprove the request. Disapproved requests will not be considered sufficient to meet the performance benchmark and shall not constitute a Reservation of Funds;

(13) not proceed or allow a contractor to proceed with construction, including demolition, on any Project or Development without first completing the required environmental clearance procedures, preconstruction conference and receiving notice to proceed, if applicable, and execution of grant agreement or loan closing with the Department, whichever is applicable;

(14) submit any Program Income received by the CA, RSP or Development Owner to the Department within ten (10) business days of receipt. Return any refunds to the Department's accounting division and include a written explanation of the return of funds, the Contract number, name of CA, RSP, or Development Owner, Project address and Project number referenced on the check;

(15) submit required documentation, for project completion reports no later than sixty (60) days after the completion of the Project;

(16) for Contract awards, submit certificate of Contract Completion within ten (10) business days of the Department's request;

(17) submit to the Department reports or information regarding the operations related to HOME funds provided by the Department; and

(18) if required by state or federal law, place the appropriate bonding requirement in any contract or subcontract entered into by the CA, RSP, or Development Owner in connection with a HOME award.

§23.29. Resale and Recapture Provisions.

(a) The Department has elected to utilize the recapture provision under 24 CFR §92.254(a)(5)(ii) as its primary method of recapturing HOME funds.

(b) The Department has established the recapture provisions described in paragraphs (1) - (4) of this subsection to ensure affordability as defined in 24 CFR §92.254(a)(5)(ii).

(1) In the event that a federal affordability period is required and the assisted property is rented or leased, or otherwise ceases to be the Principal Residence of the Household, the forgiveness of the Loan, if applicable, will cease and the entire HOME investment is subject to recapture.

(2) In the event that a federal affordability period is required and the unit is sold, including through a short sale or foreclosure, prior to the end of the affordability period, the Department will recapture the shared net proceeds available based on the requirements of 24 CFR §92.254 and as outlined in the State's Consolidated Plan.

(3) The Household can sell the unit to any willing buyer at any price.

(4) If there are no net proceeds from the sale, no repayment will be required of the Household and the balance of the loan shall be forgiven as outlined in the State's applicable Consolidated Plan.

(c) The Department has established the resale provisions described in paragraphs (1) - (7) of this subsection, in the event that the Department must impose the resale provisions of 24 CFR §92.254(a)(i).

(1) Resale is defined as the continuation of the affordability period upon the sale or transfer, rental or lease, refinancing, or the initial Household is no longer occupying the property as their Principal Residence.

(2) In the event that a federal affordability period is required and the assisted property is rented or leased, or is otherwise ceases to be the Principal Residence of the initial Household, the entire HOME investment must be repaid.

(3) In the event that a federal affordability period is required and the assisted property is sold, foreclosed, or transferred in lieu of foreclosure to a qualified low income buyer at an affordable price, the HOME loan balance shall be transferred to the subsequent qualified buyer and the affordability period shall remain in force to the extent allowed by law.

(4) The resale provisions shall remain in force from the date of loan closing until the expiration of the required affordability period.

(5) The Household is required to sell the home at an affordable price to a reasonable range of low income homebuyers that will occupy the home as their Primary Residence.

(A) The seller will be afforded a fair return on investment defined as the sum of down payment and closing costs paid from the initial seller's cash at purchase, closing costs paid by the seller at sale, the principal payments only made by the initial homebuyer in ex-

cess of the amount required by the loan, and any documented capital improvements in excess of $500.

(B) Fair return on investment is paid to the seller at sale once first mortgage debt is paid and all other conditions of the initial written agreement are met. In the event there are no funds for fair return, then fair return does not exist. In the event there are partial funds for fair return, then the appropriate partial fair return shall remain in force.

(6) The appreciated value is the affordable sales price less first mortgage debt less fair return.

(A) If appreciated value is zero, or less than zero, then no appreciated value exists.

(B) The initial homebuyer's initial investment of down payment and closing costs divided by the Department's HOME investment equals the percentage of appreciated value that shall be paid to the initial homebuyer. The balance of appreciated value shall be paid to the Department.

(7) The property purchased by the initial homebuyer will be encumbered with a deed restriction for the full affordability period.

(d) In the event that a federal affordability period is not required and the housing unit transfers by devise, descent, or operation of law upon the death of the assisted homeowner, forgiveness of installment payments under the loan may continue until maturity or the grant amount under the conditional grant agreement may be forgiven, if the heir or remainderman Household qualifies for assistance in accordance with this chapter.

(e) Forgiveness of installment payments under the loan may continue until maturity or the grant amount under conditional grant agreement may be forgiven if the housing unit is sold by the decedent's estate to a purchasing Household that qualifies for assistance in accordance with this chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 11, 2012.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: October 31, 2012
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For further information, please call: (512) 475-3916

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SUBCHAPTER C. HOMEOWNER REHABILITATION ASSISTANCE PROGRAM

10 TAC §§23.30 - 23.32

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 23, Subchapter C, §§23.30 - 23.32, concerning Homeowner Rehabilitation Assistance Program, with changes to the proposed text as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5919).

REASONED JUSTIFICATION. The Department recently underwent a reorganization which separated the HOME Division into single family and multifamily areas. The 2010 HOME rule at 10 TAC Chapter 53 did not allow for the single family and multifamily areas to effectively administer their activities with autonomy. Additionally, the Single Family HOME rules required updates which aligned more closely with the other Single Family programs, and new 10 TAC Chapter 20 specifically. Therefore, a repeal of portions of the HOME Rule at 10 TAC Chapter 53 and an adopted new Single Family HOME Program at 10 TAC Chapter 23 were necessary.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

In addition to the summary of public comment and staff response, the adopted sections, include administrative clarifications and minor clerical corrections to references and punctuation. After each comment title, numbers are shown in parentheses. These numbers refer to the person or entity that made the comment. If comment resulted in recommended language changes to the proposed rule as presented to the Board in July, such changes are indicated.

Comments were accepted from August 10, 2012 through September 10, 2012, with comments received from: (1) Langford Community Management Services, Inc; (2) GrantWorks, Inc.; (4) Texas Manufactured Housing Association; and (6) City of Midland.

§23.30. Homeowner Rehabilitation Assistance (HRA) Program Threshold and Selection Criteria.

Staff made non-substantive corrections, including amended language in paragraph (1) to clarify provision, by deleting the word "waived" and adding "not effective":

"(1) The requirements of this section are not effective until December 31, 2013."

§23.30(1)(A) - (C). Match. (1) (2)

COMMENT SUMMARY: Commenters (1) and (2) suggested more generous match levels for Cities and Counties when match is required.

For Cities: 1-5,000 population - Zero Match; 5,001+ population - 1 percent Match for every 1,000 in population to a max of 12 percent match. For Counties: 1-25,000 unincorporated population - Zero Match; 25,000+ unincorporated population - 1 percent match for every 10,000 in population to a max of 12 percent match.

STAFF RESPONSE: Match is waived for all HOME activities until December 31, 2013, unless Match is counted towards application threshold points. Staff agreed with the Commenters and recommended the match levels be reduced as recommended.

§23.31(b)(3) and (h). Homeowner Rehabilitation Assistance (HRA) Program Requirements; and Figure: 10 TAC §23.31(j), Re-payable Loans. (1) (2)

COMMENT SUMMARY: Commenters (1) and (2) recommended elimination of the requirement to repay HOME assistance for homeowners when HOME funds take out the first lien or when the homeowner's income is greater than 60 percent of Area Median Income.

STAFF RESPONSE: Rider 5 of the General Appropriations Act requires the Department to adopt a goal of no less than $30 million dollars of the funds available from HOME, Housing Trust

Funds, Section 8 and the Housing Tax Credit Program's total funds towards housing assistance for households with income less than 30 percent of Area Median Income (AMI). No less than 20 percent of funds available shall be spent on individuals between 31 and 60 percent of AMI. Allowing assistance in the form of a grant allows the funds to be targeted to lower income households to assist in meeting the Rider 5 requirements. No changes were recommended based on these comments.

§23.31(d). Direct Project Costs. (4) (6)

COMMENT SUMMARY: The proposed rules increase the direct project cost for stick built construction from $80,000 to $85,000. The cost for a replacement Manufactured Housing Unit (MHU) stayed constant at $65,000. Commenter (4) recommended the MHU replacement maximum should be equal to the direct project cost for stick built replacements to allow greater owner choice and comparison of options. Commenter (6) proposed that Direct Project Costs of stick built homes be increased to $100,000 or $85/square foot and the cost of demolition be excluded from the costs.

STAFF RESPONSE: In response to Commenter (4), the MHU replacement cap provides a comparable sized unit to a stick built unit and, thus, Staff did not recommend any changes based on this comment. In response to Commenter (6), staff is aware of increased construction costs in certain areas of the state, but due to a current lack of a generally accepted standard in these areas regarding building costs per square foot, we do not recommend increasing the construction cap at this time. No changes were recommended based on this comment at this time, however, staff will conduct more research in this area for future consideration.

§23.31(e). Allowance for Accessibility Site Work. (6)

COMMENT SUMMARY: Up to an additional $5,000 is allowed to provide additional site work related to accessibility features necessary if the house is located more than 50 feet from a paved street or if the house is elevated. Commenter (6) suggested the increase be limited to $30 per linear foot rather than up to $5,000.

STAFF RESPONSE: Staff agreed that the cost of sidewalks can vary greatly, however these funds may be used for other items such as pads and ramps, therefore, no changes were recommended based on these comments.

§23.31(f)(2). Soft Cost for MHUs. (4)

COMMENT SUMMARY: The proposed rules increase the soft cost for stick built construction from $7,000 to $9,000 per housing unit. The soft cost for MHU replacement remained constant at $3,500 per housing unit. Commenter (4) recommended that the soft costs for MHU replacement be increased to equal the soft costs allowed under stick built construction to allow greater consumer option and benefit.

STAFF RESPONSE: The contract management activities of a replacement MHU are not as extensive and do not require the same level of oversight expense as required of a stick built dwelling, therefore, no changes were recommended based on these comments.

§23.32(a)(7). Demolition Costs. (1)

COMMENT SUMMARY: Commenter (1) questioned whether or not HOME funds could be used for the cost of demolition for all HOME activities or just when relocation is involved with Homeowner Rehabilitation Assistance.

STAFF RESPONSE: A few technical corrections to the proposed rule posted in the July 26 board book were recommended and read into the record at the July 26, 2012 Board Meeting. These corrections were reflected in the official publication of the rules published in the *Texas Register* on August 10, 2012. The official version of the rules clarified that HOME funds can be used for the cost of demolition for all HOME activities, not just when relocation is involved with Homeowner Rehabilitation Assistance, therefore, no changes were recommended based on these comments.

§23.32(a)(14). Real Estate Appraisals. (1) (2)

COMMENT SUMMARY: Commenters (1) and (2) stated that Real Estate appraisals to establish after-rehabilitation value are costly and real estate appraisers are limited in rural areas. Commenter (2) suggested adding the actual construction bid to the lot value from the appraisal district to establish the after-rehabilitation value for the after-rehabilitation property.

STAFF RESPONSE: The after-rehabilitation value is required to satisfy federal requirements. Staff agreed that there are several methods to establish the after-rehabilitation value and recommended an amendment to the language:

"(14) appraisal or other valuation method approved by the Department which establishes the post rehabilitation or reconstruction value of improvements for Projects involving construction; and"

§23.32(c)(6). Certified Copies of Documents. (2)

COMMENT SUMMARY: Originals of the Grant Agreement and other loan document must be provided to the Department to disperse funds. Commenter (2) requested the Department allow dispersal of funds with certified copies of the documents.

STAFF RESPONSE: Section 23.32(c) states that paragraphs (1) - (11) may be required when a request for disbursement is made. The language allows for flexibility in extenuating circumstances. Staff did not recommend any changes based on these comments.

The Board approved the final order adopting the new sections, including non-substantive technical corrections, on October 9, 2012.

STATUTORY AUTHORITY. The new sections are adopted pursuant to the authority of Texas Government Code, §2306.053 which authorizes the Department to adopt rules.

§23.30. Homeowner Rehabilitation Assistance (HRA) Program Threshold and Selection Criteria.

All Applicants and Applications must submit or comply with this section.

(1) The requirements of this section are not effective until December 31, 2013. Any Projects submitted to the Department under a Reservation Agreement or Contract awarded prior to December 31, 2013 will not be required to provide Match as outlined in this section, except for Match that is proposed to meet Application threshold criteria. An itemized schedule of the proposed Match and evidence to support the Applicant's ability to provide the required Match is required at the time of submission. For Applications submitted to become an RSP, the Department may withhold disbursements if after every four reservations sufficient Match documentation has not been provided. The Department shall use population figures from the most recently available U.S. Census to determine the applicable tier for an Application. The Department may incentivize or provide preference to Applicants committing to provide additional Match above the requirement of this

subsection. Such incentives may be established in the form of a threshold or selection criteria and may be different for each Activity. Except for Applications for disaster relief, Match shall be required based on the tiers described in subparagraphs (A) - (C) of this paragraph:

(A) zero percent of Project funds is required as match if serving a city of less than 5,000 Persons or an unincorporated area of a county whose population in the total unincorporated area of the county is less than 25,000 Persons;

(B) one percent Match for every 1,000 in population to a maximum of 12 percent match for projects in or contracts serving cities with a population greater than 5,000; and

(C) one percent Match for every 10,000 in population in the total unincorporated area of the county to a maximum of 12 percent match for projects in or contracts serving the unincorporated area of a county.

(2) Documentation of a commitment of at least $80,000 or for a Contract award 80 percent of the award amount, whichever is less, in cash reserves to facilitate administration of the program and to ensure the capacity to cover costs prior to reimbursement or costs determined to be ineligible for reimbursement. Evidence of this commitment and the amount of the commitment must be included in the Applicant's resolution. To meet this requirement, Applicants must submit:

(A) financial statements indicating adequate local unrestricted cash or cash equivalents to utilize as cash reserves and a letter from the Applicant's bank(s) or financial institution(s) indicating that current account balances are sufficient; or

(B) evidence of an available line of credit or equivalent in an amount equal to or exceeding the requirement in subparagraph (A) of this paragraph; or

(C) the Certified Public Accountant (CPA) opinion letter from the most recent audit and a statement from the CPA that indicates, based on past experience with grant programs and past audits, the applicant has in place the best practices and financial capacity necessary in order to effectively administer a HOME Program award.

(3) Housing construction plans must meet the requirements of Chapter 20 of this title (relating to Single Family Programs Umbrella Rule).

(A) The Department will reimburse only for the first time a set of architectural plans are used, unless any subsequent site specific fees are paid to a Third Party architect, or a licensed engineer; and

(B) A Notice of funding Availability (NOFA) may include incentives or otherwise require architectural plans to incorporate "green building" elements.

§23.31. Homeowner Rehabilitation Assistance (HRA) Program Requirements.

(a) Eligible Projects are limited to:

(1) the Rehabilitation or Reconstruction of existing owner-occupied housing on the same site. The Rehabilitation of a Manufactured Housing Unit (MHU) is not an eligible Project;

(2) the New Construction of site-built housing on the same site to replace an existing owner-occupied MHU;

(3) the replacement of existing owner-occupied housing with an MHU or New Construction of site-built housing on another site contingent upon written approval of the Department;

(4) if housing unit is uninhabitable as a result of disaster or condemnation by local government, the Household is eligible for the New Construction of site-built housing or an MHU under this section provided the assisted Household documents that the housing unit was previously their Principal Residence through evidence of a homestead exemption from the local taxing jurisdiction and Household certification; or

(5) if allowable under the Notice of Funding Availability (NOFA), the refinance of an existing mortgage meeting the federal requirements at 24 CFR §92.206(b) and any additional requirements in the NOFA.

(b) If a housing unit has an existing mortgage loan and Department funds are provided in the form of a loan, the Department will require a first lien if the loan has an outstanding balance that is less than the investment of HOME funds and any of the statements described in paragraphs (1) - (3) of this subsection are true:

(1) a federal affordability period is required; or

(2) any existing mortgage has been in place for less three (3) years from the date the Household applies for assistance; or

(3) the HOME loan is structured as a repayable loan.

(c) The Household must be current on any existing mortgage loans or home equity loans. If the Department's assistance is provided in the form of a loan, the property cannot have any existing home equity loan liens.

(d) Direct Project Costs, exclusive of Match funds, and are limited to:

(1) Reconstruction and New Construction of site-built housing: the lesser of $78 per square foot or $85,000, or for Households of six or more Persons the lesser of $78 per square foot or $90,000;

(2) replacement with an MHU: $65,000;

(3) rehabilitation that is not Reconstruction: $40,000; and

(4) refinancing of existing mortgages: in addition to the costs limited under paragraphs (1) - (3) of this subsection, the cost to refinance an existing mortgage is limited to $35,000. To qualify, a Household's current total housing payment must be greater than 30 percent of their monthly gross income or their total monthly recurring debt payments must be greater than 45 percent of their gross monthly income.

(e) In addition to the Direct Project Costs allowable under subsection (d) of this section, up to $5,000 will be allowed in Direct Project Costs for additional sitework related to accessibility features if the house will be located more than 50 feet from the nearest paved roadway or if the house is being elevated above the floodplain.

(f) Project soft costs are limited to:

(1) Reconstruction or New Construction: no more than $9,000 per housing unit;

(2) replacement with an MHU: no more than $3,500 per housing unit;

(3) rehabilitation that is not Reconstruction: $5,000 per housing unit. This limit may be exceeded for lead-based paint remediation and only upon prior approval of the Division Director. The costs of testing and assessments for lead-based paint are not eligible Project soft costs for housing units that are Reconstructed or if the existing housing unit was built after December 31, 1977; and

(4) third-party Project soft costs related to loan closing requirements, such as appraisals, title reports or insurance, tax certifi-

cates, recording fees, and surveys are not subject to a maximum per Project.

(g) Funds for Administrative costs are limited to no more than 4 percent of the Direct Project Costs, exclusive of Match funds.

(h) In the instances described in paragraphs (1) - (4) of this subsection, the assistance to an eligible Household shall be in the form of a loan in the amount of the Direct Project Costs excluding Match funds. If the Household is at or below 60 percent area median family income (AMFI), the loan will be at zero percent interest and include deferral of payment and annual pro-rata forgiveness with a term based on the federal affordability requirements as defined in 24 CFR §92.254. If the Household is above 60 percent AMFI but at or below 80 percent AMFI, the assistance to the Household will be a zero percent interest repayable with a 30-year term.

(1) An MHU being replaced with newly constructed housing (site-built) on the same site;

(2) Any housing unit being replaced on an another site;

(3) Any housing unit that is being relocated out of the floodplain or replaced due to uninhabitability as allowed under subsection (a)(4) of this section; and

(4) Any Project that requires a federal affordability period.

(i) For any Project involving refinancing described in subsection (d)(4) of this section, the HOME funds used for refinancing shall be structured as a fully amortizing, repayable loan at zero percent interest. The loan term shall be calculated by setting the total estimated housing payment (including principal, interest, property taxes, insurance, and any other homebuyer assistance), equal to 20 percent of the Household's gross monthly income. The term shall not exceed thirty (30) years. Total debt service (back-end ratio) may not exceed 45 percent. Any Direct Project Costs, exclusive of refinancing costs and Match funds, shall be structured as a deferred, forgivable loan with a 15-year term.

(j) In all other instances not described in subsections (h) and (i) of this section, the assistance to an eligible Household may be in the form of a loan or grant agreement in the amount of the Direct Project Costs exclusive of Match funds with an affordability term based on the Household's AMFI as reflected in Figure: 10 TAC §23.31(j).
Figure: 10 TAC §23.31(j)

(k) To ensure affordability, the Department will impose resale and recapture provisions established in this chapter.

(l) For Reconstruction and New Construction, site-built housing units must meet or exceed the 2000 International Residential Code and all applicable local codes and standards. In addition, housing that is Rehabilitated under this chapter must meet the Texas Minimum Construction Standards (TMCS) and all other applicable local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with this chapter.

§23.32. Homeowner Rehabilitation Assistance (HRA) Administrative Requirements.

(a) Commitment or Reservation of Funds. The Contract Administrator (CA) or Reservation System Participant (RSP) must submit the true and complete information, certified as such, with a request for the Commitment or Reservation of Funds as described in paragraphs (1) - (15) of this subsection:

(1) head of Household name and address of housing unit for which assistance is being requested;

(2) a budget that includes the amount of Project funds specifying the acquisition costs, construction costs, soft costs and administrative costs requested, a maximum of 5 percent of hard construction costs for contingency items, proposed Match to be provided, evidence that Direct Project Cost and soft cost limitations are not exceeded, and evidence that any duplication of benefit is addressed;

(3) verification of environmental clearance;

(4) a copy of the Household's intake application on a form prescribed by the Department;

(5) certification of the income eligibility of the Household signed by the CA or RSP and all Household members age 18 or over, and including the date of the income eligibility determination. In instances where the total Household income is within $3,000 of the 80 percent AMFI, all documentation used to determine the income of the Household;

(6) provide written consent from all Persons who have a valid lien or ownership interest in the Property for the rehabilitation or reconstruction Projects;

(7) in the instance of relocation and in accordance with §23.31(a)(3) of this chapter (relating to Homeowner Rehabilitation Assistance (HRA) Program Requirements), the Household must document Homeownership of the existing unit to be replaced and must establish Homeownership of the lot on which the replacement housing unit will be constructed. The Household must agree to the demolition of the existing housing unit. HOME Project funds cannot be used for the demolition of the existing unit and any funding used for the demolition is not eligible Match; however, solely for a Project under this paragraph, the CA or RSP Match obligation may be reduced by the cost of such demolition without any Contract amendment;

(8) identification of any Lead-Based Paint (LBP);

(9) for housing units located within the 100-year floodplain, a quote for the cost of flood insurance and certification from the Household that they understand the flood insurance requirements;

(10) consent to demolish from any existing mortgage lien holders and consent to subordinate to the Department's Loan, if applicable;

(11) if applicable, documentation to address or resolve any potential conflict of interest, identity of interest, duplication of benefit, or floodplain mitigation;

(12) a title commitment or policy or a down date endorsement to an existing title policy, and the actual documents, or legible copies thereof, establishing the Household's ownership, such as a warranty deed or ninety-nine (99) year leasehold. For assistance provided in the form of a grant agreement, a title report may be submitted in lieu of a title commitment or policy. In instances of an MHU, a Statement of Ownership and Location (SOL) must be submitted. Together, these documents must evidence the definition of Homeownership is met;

(13) tax certificate that evidences a current paid status, and in the case of delinquency, evidence of an approved payment plan with the taxing authority and evidence that the payment plan is current;

(14) appraisal or other valuation method approved by the Department which establishes the post rehabilitation or reconstruction value of improvements for Projects involving construction; and

(15) any other documentation necessary to evidence that the Project meets the program requirements.

(b) Loan closing or grant agreement. The CA or RSP must comply with or submit the documents described in paragraphs (1) - (3) of this subsection, with a request for the preparation of loan closing or

grant agreement as applicable, with the request for the Commitment or Reservation of Funds:

(1) a title commitment or title policy that expires prior to execution of closing must be updated at closing and must not have any adverse changes in order to close. An updated title report is not required for grant agreements;

(2) in the instances of replacement with an MHU, information necessary to draft loan documents or grant agreements to issue SOL; and

(3) life event documentation, as applicable, and all information necessary to prepare any applicable affidavits such as marital status and heirship.

(c) Disbursement of funds. The CA or RSP must comply with all of the requirements described in paragraphs (1) - (11) of this subsection, for a request for disbursement of funds to reimburse eligible costs incurred. Submission of documentation related to the CA's or RSP's compliance with requirements described in paragraphs (1) - (11) of this subsection, may be required with a request for disbursement:

(1) for construction costs associated with a loan, a down date endorsement to the title policy not older than the date of the last disbursement of funds or forty-five (45) days, whichever is later. For release of retainage the down date endorsement must be dated at least thirty (30) days after the date of construction completion;

(2) for construction costs associated with a grant agreement, an interim lien waiver or final lien waiver. For release of retainage the final lien waiver must be dated at least thirty (30) days after the date of construction completion;

(3) if applicable, up to 50 percent of Project funds for a Project may be drawn before providing evidence of Match. Thereafter, each CA or RSP must provide evidence of Match, including the date of provision, in accordance with the percentage of Project funds disbursed;

(4) property inspections, including photographs of the front and side elevation of the housing unit and at least one picture of the kitchen, family room, one of the bedrooms and one of the bathrooms with date and property address reflected on each photo. The inspection must be signed and dated by the inspector and CA or RSP;

(5) certification that its fiscal control and fund accounting procedures are adequate to assure the proper disbursal of, and accounting for, funds provided, no Person that would benefit from the award of HOME funds has provided a source of Match or has satisfied the Applicant's cash reserve obligation or made promises in connection therewith; that each request for disbursement of HOME funds is for the actual cost of providing a service and that the service does not violate any conflict of interest provisions;

(6) the executed grant agreement or original, executed, legally enforceable loan documents and statement of location, if applicable, for each assisted Household containing remedies adequate to enforce any applicable affordability requirements. Original documents must evidence that such agreements have been recorded in the real property records of the county in which the housing unit is located and the original documents must be returned, duly certified as to recordation by the appropriate county official;

(7) expenditures must be allowable and reasonable in accordance with federal, state, and local rules and regulations. The Department shall determine the reasonableness of each expenditure submitted for reimbursement. The Department may request CA or RSP to make modifications to the disbursement request and is authorized to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of HOME funds to CA or RSP as may be necessary or advisable for compliance with all Program Rules;

(8) the request for funds for Administrative costs must be proportionate to the amount of Direct Project Costs requested or already disbursed;

(9) include the withholding of 10 percent of hard construction costs for retainage. Retainage will be held until at least thirty (30) days after completion of construction;

(10) for final disbursement requests, submission of documentation required for Project completion reports and evidence that the demolition or, if an MHU, salvage and removal of all dilapidated housing units on the lot occurred for Newly Constructed or Rehabilitated housing unit, certification or other evidence acceptable to Department that the replacement house, whether site-built or MHU, was constructed or placed on and within the same lot for which ownership was established and on and within the same lot secured by the loan or grant agreement, if applicable, and evidence of floodplain mitigation; and

(11) the final request for disbursement must be submitted to the Department with support documentation no later than sixty (60) days after the termination date of the Contract in order to remain in compliance with Contract and eligible for future funding. The Department shall not be obligated to pay for costs incurred or performances rendered after the termination date of a Contract.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 11, 2012.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER D. HOMEBUYER ASSISTANCE PROGRAM

10 TAC §§23.40 - 23.42

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 23, Subchapter D, §§23.40 - 23.42, concerning Homebuyer Assistance Program, with changes to the proposed text as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5922).

REASONED JUSTIFICATION. The Department recently underwent a reorganization which separated the HOME Division into single family and multifamily areas. The 2010 HOME rule at 10 TAC Chapter 53 did not allow for the single family and multifamily areas to effectively administer their activities with autonomy. Additionally, the Single Family HOME rules required updates which aligned more closely with the other Single Family programs, and new 10 TAC Chapter 20 specifically. Therefore, a repeal of portions of the HOME Rule at 10 TAC Chapter 53 and an adopted

new Single Family HOME Program at 10 TAC Chapter 23 were necessary.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

In addition to the summary of public comment and staff response, the sections as recommended for adoption include administrative clarifications and minor clerical corrections to references and punctuation. After each comment title, numbers are shown in parentheses. These numbers refer to the person or entity that made the comment as reflected in the Addendum. If comment resulted in recommended language changes to the draft rule as presented to the Board in July, such changes are indicated.

Comments were accepted from August 10, 2012 through September 10, 2012, with comments received from (3) Midland Habitat for Humanity; (5) Resource Management and Consulting Co.; (7) Hunter and Hunter Consultants, Inc.; (9) Texas Associations of Community Development Corporations; (10) Disability Advisory Workgroup; and (11) Easter Seals.

§23.40(1). Match Requirements. (7)

COMMENT SUMMARY: Commenter (7) recommended the match requirement be permanently removed from the HBA program due to the difficulty Administrators have in identifying sources of match funds under the HBA program.

STAFF RESPONSE: Match is a federal requirement under the HOME program. The Department currently has match in excess of the amount necessary to meet the federal requirements and has the ability to waive the match requirements. The match requirement should periodically be reviewed and annualized and a permanent waiver is not recommended; therefore, no changes were recommended based on these comments.

Proposed §23.41(c)(4). First Lien Purchase Loans. (7)

COMMENT SUMMARY: Commenter (7) recommended deletion of this paragraph because the language conflicts with other provisions of the section.

STAFF RESPONSE: Staff agreed that this language appears to conflict with other provisions in this section and recommended removal of this provision.

Proposed §23.41(c)(5). Debt to income ratios. (7)

COMMENT SUMMARY: The total debt to income ratios or back end ratios for non-conforming mortgage loans cannot exceed 45 percent. Commenter (7) recommended the back end ratio to equal the FHA approved debt to income ratio.

STAFF RESPONSE: HUD requires the Department to establish underwriting standards and criteria for HOME programs. This section applies only to non-conforming first lien mortgages. The adoption of a standard 45 percent back end ratio for non-conforming loans protects program funds and complies with HUD requirements; therefore, no changes were recommended based on these comments.

Proposed §23.41(c)(6). Fees Charged to First Lien Mortgage Lenders (7)

COMMENT SUMMARY: Commenter (7) recommended modified language to replace the proposed language of this subsection.

(6) Fees charged by third party mortgage lenders are limited to the greater of 2 percent of the mortgage loan amount of $3,500, including but not limited to origination, application, and/or underwriting fees. Fees associated with the origination of Single Family Mortgage Revenue Bond and Mortgage Credit Certificate programs will not be included in the limit. Fees paid to parties other than the first lien lender and reflected on the HUD-1 will not be included in the limit. Fees collected by the first lien lender at closing to be paid to other parties by the first lien lender that are supported by an invoice and reflected on the HUD-1 will not be included in the limit.

STAFF RESPONSE: Staff agreed with commenter and recommended the modified language as suggested.

§23.41(d)(1) and §23.71(i)(2). Front End Ratios. (3)(5)(7)(9)(10)(11)

COMMENT SUMMARY: The amount of down payment assistance provided under the home buyer assistance program is restricted to the amount necessary such that the total housing payment is at least 20 percent of the applicant's gross income. Commenter (3) recommended eliminating or reducing the front end ratio to 15 percent of the gross income of applicants requesting down payment assistance. Commenters (5), (7), and (9) recommended elimination or reduction of the ratio of income to total house payment (front end ratio) or to allow the FHA approved debt ratios or first lien lender to determine both the front and back end ratios according to their lending requirements. Commenters (5) and (9) suggested the ratio be reduced from 20 percent to 15 percent. Commenter (11) recommended elimination of the front end ratio altogether. Commenter (7) recommended an alternative suggestion that HOME down payment assistance is offered equal to 20 percent of the sales price up to a maximum of $20,000. In addition Commenter (7) suggested that the HOME assistance be calculated prior to the addition of other down payment assistance or forgiveness of loans. Commenter (10) requested a waiver of the front end ratio to accommodate very low income households.

STAFF RESPONSE: The front end ratio was established in the 2010 HOME Rules at 25 percent of gross monthly income to satisfy HUD's requirement in 24 CFR §92.250 that HOME funds are used prudently and do not result in more subsidy than necessary to make the unit affordable to the homebuyer. The rule as proposed and published in the *Texas Register* reduced the required front-end ratio to from 25 percent to 20 percent of gross monthly income in response to comments received by administrators prior to the rulemaking process. Staff did not recommend further reduction of the front-end ratio. No support documentation was provided by Commenter (3) to indicate that a reduction of the front end ratio to 15 percent would be reasonable and necessary to assist low income homebuyers. Staff did not recommend that assistance be based on a percentage of the purchase price of the unit because that method does not account for individual circumstances and loan terms. In addition, staff did not recommend waivers of the front end ratio for very low income households when the 20 percent front end ratio is lower than the standard established in the rental industry of 30 percent. HUD has determined that it is reasonable and affordable in rental housing programs which target very low and extremely low income households, such as the Section 8 Housing Choice Voucher Program, for households to pay 30 percent of their income towards rent. No changes were recommended based on these comments.

§23.41(e)(1). Soft Costs. (7)

COMMENT SUMMARY: The closing costs associated with the Home Buyer Assistance Program are limited to $1,500. Com-

menter (7) recommended increasing soft costs to $1,800 which will increase fees charged by consultants and Contract Administrators.

STAFF RESPONSE: The Commenter offered no reasons to support the increase; therefore, no changes were recommended based on these comments.

The Board approved the final order adopting the new sections including non-substantive technical corrections, on October 9, 2012.

STATUTORY AUTHORITY. The new sections are adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

§23.40. Homebuyer Assistance (HBA) Threshold and Selection Criteria.

All Applicants and Applications must submit or comply with this section.

(1) The requirements of this section are waived until August 31, 2013. Any Projects submitted to the Department under a Reservation Agreement or Contract awarded prior to December 31, 2013 will not be required to provide Match as outlined in this section, except for Match that is proposed to meet Application threshold criteria. An itemized schedule of the proposed Match and evidence to support the Applicant's ability to provide the required Match must be submitted. The Department may not require such support at the time an Application is submitted when the funds are made available under a reservation system. Except for Applications for disaster relief and Persons with Disabilities set-asides, the amount of Match required must be at least 5 percent of Project funds requested. The Department may incentivize or provide preference to Applicants committing to provide additional Match above the requirement of this section. Such incentives may be established in the form of a threshold or selection criteria and may be different for each Activity.

(2) Documentation of a commitment of at least $80,000 or for a Contract award, 100 percent of the award amount, whichever is less, in cash reserves to facilitate administration of the program and to ensure the capacity to cover costs prior to reimbursement or costs determined to be ineligible for reimbursement. Evidence of this commitment and the amount of the commitment must be included in the Applicant's resolution. To meet this requirement, Applicants must submit:

(A) financial statements indicating adequate local unrestricted cash or cash equivalents to utilize as cash reserves and a letter from the Applicant's bank(s) or financial institution(s) indicating that current account balances are sufficient; or

(B) evidence of an available line of credit or equivalent in an amount equal to or exceeding the requirement in subparagraph (A) of this paragraph; or

(C) the Certified Public Accountant (CPA) opinion letter from the most recent audit and a statement from the CPA that indicates, based on past experience with grant programs and past audits, the applicant has in place the best practices and financial capacity necessary in order to effectively administer a HOME Program award.

§23.41. Homebuyer Assistance (HBA) Program Requirements.

(a) Eligible activities are limited to the acquisition or acquisition and Rehabilitation for accessibility modifications of single family housing units.

(b) The Household must complete a homebuyer counseling program/class.

(c) First lien purchase loans must comply with the requirements described in paragraphs (1) - (7) of this subsection:

(1) No adjustable rate mortgage loans or temporary interest rate buy-down loans are allowed;

(2) No first lien mortgage loans with a total loan to value equal to or greater than 100 percent are allowed;

(3) No Subprime Mortgage Loans are allowed;

(4) For Nonconforming Mortgage Loans, the debt to income ratio (back-end ratio) may not exceed 45 percent;

(5) Fees charged by third party mortgage lenders are limited to the greater of 2 percent of the mortgage loan amount or $3,500, including but not limited to origination, application, and/or underwriting fees. Fees associated with the origination of Single Family Mortgage Revenue Bond and Mortgage Credit Certificate programs will not be included in the limit. Fees paid to parties other than the first lien lender and reflected on the HUD-1 will not be included in the limit. Fees collected by the first lien lender at closing to be paid to other parties by the first lien lender that are supported by an invoice and reflected on the HUD-1 will not be included in the limit;

(6) No identity of interest relationship between the lender and the Household is allowed; and

(7) If an identity of interest exists between the Household and the seller, the Department may require additional documentation that evidences that the sales price is equal to or less than the appraised value of the property as documented by a Third-Party appraisal ordered by the first lien lender. If an identity of interest exists between the builder and Contract Administrator (CA) or Reservation System Participant (RSP), the CA or RSP must provide documentation that evidences that the sales price does not provide for a profit of more than 15 percent of the total hard construction costs and does not exceed the current appraised value as documented by a Third-Party appraisal ordered by the first lien lender.

(d) Direct Project Costs, exclusive of Match funds, are limited to:

(1) acquisition and closing costs: the lesser of $20,000 or the amount necessary as determined by an affordability analysis that evidences the total estimated housing payment (including principal, interest, property taxes, insurance, and any other homebuyer assistance) is no less than 20 percent of the Household's gross monthly income based on a thirty (30) year amortization schedule. If the estimated housing payment will be less than 20 percent, the Department shall reduce the amount of downpayment assistance to the homebuyer such that the total estimated housing payment is no less than 20 percent of the homebuyer's gross income; and

(2) rehabilitation for accessibility modifications: $20,000; and

(3) the amount necessary to acquire the home and make accessibility modifications (funds may not be disbursed to the Household at closing).

(e) Project soft costs are limited to:

(1) acquisition and closing costs: no more than $1,500 per housing unit; and

(2) rehabilitation for accessibility modifications: $5,000 per housing unit.

(f) Funds for Administrative costs are limited to no more than 4 percent of the Direct Project Costs, exclusive of Match funds.

(g) The assistance to an eligible Household shall be in the form of a loan in the amount of the Direct Project Costs, excluding Match funds. The loan will be at zero percent interest and include deferral of payment and annual pro-rata forgiveness with a term based on the federal affordability requirements as defined in 24 CFR §92.254.

(h) Any forgiveness of the Loan occurs upon the anniversary date of the Household's continuous occupancy as its Principal Residence and continues on an annual pro-rata basis until maturity of the Loan.

(i) To ensure affordability, the Department will impose the recapture provisions established in this chapter.

(j) Housing units that will be rehabilitated with HOME funds must meet or exceed the Texas Minimum Construction Standard (TMCS), as applicable and all applicable codes and standards. In addition, housing that is Rehabilitated under this chapter must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with the HOME Final Rule. Housing units that are provided assistance for acquisition only must meet all applicable state and local housing quality standards and code requirements. In the absence of such standards and requirements, the housing units must meet the Housing Quality Standards (HQS) in 24 CFR §982.401.

§23.42. Homebuyer Assistance (HBA) Administrative Requirements.

(a) Commitment or Reservation of Funds. The CA or RSP must submit true and complete information, certified as such, with a request for the Commitment or Reservation of Funds, as described in paragraphs (1) - (11) of this subsection:

(1) Head of Household name and address of housing unit for which assistance is being requested;

(2) A budget that includes the amount of Project funds specifying the acquisition costs, construction costs, soft costs and administrative costs requested. A maximum of 5 percent of hard construction costs for contingency items, proposed Match to be provided, evidence that Project and soft cost limitations are not exceeded, and evidence that any duplication of benefit is addressed;

(3) Verification of environmental clearance;

(4) A copy of the Household's intake application on a form prescribed by the Department;

(5) Certification of the income eligibility of the Household signed by the CA or RSP, and all Household members age 18 or over, and including the date of the income eligibility determination. In instances the total Household income is within $3,000 of the 80 percent area median family income, all documentation used to determine the income of the Household;

(6) Identification of Lead-Based Paint (LBP);

(7) For housing units located within the 100-year floodplain, a quote for the cost of flood insurance and certification from the Household that they understand the flood insurance requirements;

(8) Executed sales contract and documentation that the first lien mortgage meets the eligibility requirements;

(9) If applicable, documentation to address or resolve any potential Conflict of Interest, identity of interest, or duplication of benefit;

(10) Appraisal which includes post rehabilitation or reconstruction improvements for Projects involving construction; and

(11) Any other documentation necessary to evidence that the Project meets the program requirements.

(b) Loan closing. The CA or RSP must submit the documents described in paragraphs (1) and (2) of this subsection, with a request for the preparation of loan closing with the request for the Commitment or Reservation of Funds:

(1) A title commitment to issue a title policy that evidences the property will transfer with no tax lien, child support lien, mechanics or materialman's lien or any other restrictions or encumbrances that impair the good and marketable nature of title to the ownership interest and that the definition of Homeownership will be met. Commitments that expire prior to execution of closing must be updated at closing and must not have any adverse changes in order to close; and

(2) A good faith estimate that is, or letter from the lender confirming that the loan terms and closing costs will be consistent with the executed sales contract, the first lien mortgage loan requirements, and the requirements of this chapter.

(c) Disbursement of funds. The CA or RSP must comply all of the requirements described in paragraphs (1) - (10) of this subsection, for a request for disbursement of funds to reimburse eligible costs incurred. Submission of documentation related to the CA's or RSP's compliance with requirements described in paragraphs (1) - (10) of this subsection, may be required with a request for disbursement:

(1) For construction costs that are a part of a loan subject to the requirements of this subsection, a down date endorsement to the title policy not older than the date of the last disbursement of funds or forty-five (45) days, whichever is later. For release of retainage the down date endorsement must be dated at least thirty (30) days after the date of construction completion;

(2) If applicable, up to 50 percent of Project funds for a Project may be drawn before providing evidence of Match. Thereafter, each CA or RSP must provide evidence of Match, including the date of provision, in accordance with the percentage of Project funds disbursed;

(3) The property inspection must be signed and dated by the inspector and CA, RSP, or Development Owner;

(4) Certification that its fiscal control and fund accounting procedures are adequate to assure the proper disbursal of, and accounting for, funds provided, no Person that would benefit from the award of HOME funds has provided a source of Match or has satisfied the Applicant's cash reserve obligation or made promises in connection therewith; that each request for disbursement of HOME funds is for the actual cost of providing a service and that the service does not violate any conflict of interest provisions;

(5) Original, executed, legally enforceable loan documents for each assisted Household containing remedies adequate to enforce any applicable affordability requirements. Original documents must evidence that such agreements have been recorded in the real property records of the county in which the housing unit is located and the original documents must be returned, duly certified as to recordation by the appropriate county official. This provision is not applicable for funds made available at the loan closing;

(6) Expenditures must be allowable and reasonable in accordance with federal, state, and local rules and regulations. The Department shall determine the reasonableness of each expenditure submitted for reimbursement. The Department may request CA or RSP to make modifications to the disbursement request and is authorized to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of HOME funds to CA or RSP as may be necessary or advisable for compliance with all program requirements;

(7) The request for funds for Administrative costs must be proportionate to the amount of Direct Project Costs requested or already disbursed;

(8) Table funding requests must be submitted to the Department with complete documentation no later than ten (10) business days prior to the anticipated loan closing date. Such a request must include a draft settlement statement, title company payee identification information, the Development Owner's authorization for disbursement of funds to the title company, request letter from title company to the Texas Comptroller with bank account wiring instructions, and invoices for soft costs being paid at closing;

(9) For Activities involving Rehabilitation, include the withholding of 10 percent of hard construction costs for retainage. Retainage will be held until at least thirty (30) days after completion of construction and until submission of documentation required for Project completion reports; and

(10) The final request for disbursement must be submitted to the Department with support documentation no later than sixty (60) days after the termination date of the Contract in order to remain in compliance with Contract and eligible for future funding. The Department shall not be obligated to pay for costs incurred or performances rendered after the termination date of a Contract.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 11, 2012.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER E. CONTRACT FOR DEED CONVERSION PROGRAM

10 TAC §§23.50 - 23.52

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 23, Subchapter E, §§23.50 - 23.52, concerning Contract for Deed Conversion Program. Section 23.51 is adopted with changes to the proposed text as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5924). Section 23.50 and §23.52 are adopted without changes and will not be republished.

REASONED JUSTIFICATION. The Department recently underwent a reorganization which separated the HOME Division into single family and multifamily areas. The 2010 HOME rule at 10 TAC Chapter 53 did not allow for the single family and multifamily areas to effectively administer their activities with autonomy. Additionally, the Single Family HOME rules required updates which aligned more closely with the other Single Family programs, and new 10 TAC Chapter 20 specifically. Therefore, a repeal of portions of the HOME Rule at 10 TAC Chapter 53 and an adopted new Single Family HOME Program at 10 TAC Chapter 23 were necessary.

The Department accepted public comments between August 10, 2012 and September 10, 2012. Comments regarding the new sections were accepted in writing and by fax. No comments were received concerning the new sections.

The Board approved the final order adopting the new sections as well as non-substantive corrections, on October 9, 2012.

STATUTORY AUTHORITY. The new sections are adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

§23.51. Contract for Deed Conversion (CFDC) Program Requirements.

(a) Eligible activities are limited to the acquisition or acquisition and Rehabilitation, Reconstruction, or New Construction of single family housing units.

(b) A new Manufactured Housing Unit (MHU) is an eligible property type for acquisition only. An MHU is not an eligible property type for Rehabilitation.

(c) The Household's income must not exceed 60 percent area median family income (AMFI) and the Household must complete a homebuyer counseling program/class.

(d) The Department will require a first lien position.

(e) Direct Project Costs, exclusive of Match funds, are limited to:

(1) acquisition and closing costs: $35,000. In the case of a contract for deed conversion housing unit that involves the acquisition of a loan on an existing MHU and/or the loan for the associated land, the Executive Director may grant an exception to exceed this amount, however, the Executive Director will not grant an exception to exceed $40,000 of assistance;

(2) Reconstruction and New Construction of site-built housing: the lesser of $78 per square foot or $85,000, or for Households of six or more Persons the lesser of $78 per square foot or $90,000;

(3) replacement with an MHU: $65,000; and

(4) rehabilitation that is not Reconstruction: $40,000.

(f) In addition to the Direct Project Costs allowable under subsection (e) of this section, up to $5,000 will be allowed in Direct Project Costs for additional sitework related to accessibility features if the house will be located more than 50 feet from the nearest paved roadway or if the house is being elevated above the floodplain.

(g) Project soft costs are limited to:

(1) acquisition and closing costs: no more than $1,500 per housing unit;

(2) Reconstruction or New Construction: no more than $9,000 per housing unit;

(3) replacement with and MHU: no more than $3,500 per housing unit; and

(4) rehabilitation that is not Reconstruction: $5,000 per housing unit. This limit may be exceeded for lead-based remediation and only upon prior approval of the Division Director. The costs of testing and assessments for lead-based paint are not eligible Project soft costs for housing units that are reconstructed or if the existing housing unit was built after December 31, 1977.

(h) Funds for administrative costs are limited to no more than 4 percent of the Direct Project Costs, exclusive of Match funds.

(i) The assistance to an eligible Household shall be in the form of a loan in the amount of the Direct Project Costs excluding Match funds. The loan will be at zero percent interest and include deferral of payment and annual pro-rata forgiveness with a term based on the federal affordability requirements as defined in 24 CFR §92.254.

(j) Any forgiveness of the Loan occurs upon the anniversary date of the Household's continuous occupancy as its Principal Residence and continues on an annual pro-rata basis until maturity of the Loan.

(k) To ensure affordability, the Department will impose resale and recapture provisions established in this chapter.

(l) For Reconstruction and New Construction, site-built housing units must meet or exceed the 2000 International Residential Code and all applicable local codes and standards. In addition, housing that is Rehabilitated under this chapter must meet the Texas Minimum Construction Standards (TMCS) and all other applicable local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with the HOME Final Rule. Housing units that are provided assistance for acquisition only must meet all applicable state and local housing quality standards and code requirements. In the absence of such standards and requirements, the housing units must meet the Housing Quality Standards (HQS) in 24 CFR §982.401.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. TENANT-BASED RENTAL ASSISTANCE PROGRAM

10 TAC §§23.60 - 23.62

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 23, Subchapter F, §§23.60 - 23.62, concerning Tenant-Based Rental Assistance Program. Section 23.61 is adopted with changes to the proposed text as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5927). Section 23.60 and §23.62 are adopted without changes and will not be republished.

REASONED JUSTIFICATION. The Department recently underwent a reorganization which separated the HOME Division into single family and multifamily areas. The 2010 HOME rule at 10 TAC Chapter 53 did not allow for the single family and multifamily areas to effectively administer their activities with autonomy. Additionally, the Single Family HOME rules required updates which aligned more closely with the other Single Family programs, and new 10 TAC Chapter 20 specifically. Therefore, a repeal of portions of the HOME Rule at 10 TAC Chapter 53 and an adopted new Single Family HOME Program at 10 TAC Chapter 23 were necessary.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

In addition to the summary of public comment and staff response, the sections as recommended for adoption include administrative clarifications and minor clerical corrections to references and punctuation in §23.61. After each comment title, numbers are shown in parentheses. These numbers refer to the person or entity that made the comment as reflected in the Addendum. If comment resulted in recommended language changes to the draft rule as presented to the Board in July, such changes are indicated.

Comments were accepted from August 10, 2012 through September 10, 2012, with comments received from: (10) Disability Advisory Workgroup.

§23.61(e)(1). Rental subsidy limitations. (10)

COMMENT SUMMARY: HOME Tenant Based Rental Assistance (TBRA) is provided for no more than a twenty-four (24) month period per household. An additional twelve (12) month period is permitted for a total of thirty-six (36) months if the household is participating under the Reservation System. Commenter (10), an Administrator of the program, stated that many households receiving HOME rental assistance are awaiting Section 8 vouchers which may take five or more years. The Commenter recommends extending HOME rental assistance beyond thirty-six months to those on long Section 8 waiting lists.

STAFF RESPONSE: Staff agreed that in cases where the household will likely require continued rental assistance though the Section 8 Housing Choice Voucher (HCV) Program, and is unable to secure a Section 8 HCV in the 36 month time frame outlined in the HOME rule, due to exceedingly long wait times for available vouchers, a gap in assistance could occur. TBRA is not intended to be permanent assistance, therefore an indefinite time period is not in keeping with the intent of the program. Staff recommended that the rule be amended to allow an extension of assistance, on an annual basis, for up to sixty (60) months for households who have applied for a Section 8 HCV, have not been removed from the Section 8 HCV waiting list due to failure to respond to required notices or for any other reason, have not been denied assistance under the Section 8 HCV Program during their tenure on TBRA, and did not refuse to participate in the Section 8 HCV Program when a voucher was made available.

The Board approved the final order adopting the new sections including non-substantive technical corrections, on October 9, 2012.

STATUTORY AUTHORITY. The new sections are adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

§23.61. Tenant-Based Rental Assistance (TBRA) Program Requirements.

(a) The Household must participate in a self-sufficiency program.

(b) The amount of assistance will be determined using the Housing Choice Voucher Method.

(c) Households certifying to zero income must also complete a questionnaire which includes a series of questions regarding how basic hygiene, dietary, transportation, and other living needs are met.

(d) The minimum Household contribution toward gross monthly rent must be 10 percent of the Household's gross monthly income.

(e) Project funds are limited to:

(1) rental subsidy: The rental subsidy term is limited to no more than twenty-four (24) months under a contract award. Households served under a reservation agreement may be granted a twelve (12) month extension, for a period of assistance not to exceed thirty-six (36) month cumulatively. A household may be eligible for an additional twenty-four months of assistance, for a period of assistance not to exceed sixty (60) months cumulatively, if:

(A) the household has applied for a Section 8 Housing Choice Voucher and is placed on a waiting list during their TBRA participation tenure; and

(B) the household has not been removed from the Section 8 Housing Choice Voucher waiting list due to failure to respond to required notices or other ineligibility factors; and

(C) the household has not been denied participation in the Section 8 Housing Choice Voucher program while they were being assisted with HOME TBRA; and

(D) the household did not refuse to participate in the Section 8 Housing Choice Voucher program when a voucher was made available;

(2) security deposit: no more than the amount equal to two (2) month's rent for the unit.

(f) The payment standard must be the current U.S. Department of Housing and Urban Development (HUD) "Fair Market Rent for the Housing Choice Voucher Program" at the time the household is income certified (or the rental coupon is executed). In instances where the area rents exceed the established Fair Market Rent, the Contract Administrator (CA) or Reservation System Participant (RSP) may submit a written request to the Department for approval of a higher payment standard. The request must be evidenced by a market study. For HOME-assisted units, the payment standard must be the current HOME rent applicable for the unit.

(g) The lease agreement start date must correspond to the date of the TBRA rental coupon contract. The dates may be different only upon prior approval of the Executive Director or his/her designee.

(h) Funds for Administrative costs are limited to 8 percent of Direct Project Costs, excluding Match funds. Funds for Administrative costs may be increased an additional 1 percent of Direct Project Costs if Match is provided in an amount equal to 5 percent or more of Direct Project Costs.

(i) Rental units must be inspected prior to occupancy, annually upon Household recertification, and must comply with Housing Quality Standards established by HUD.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. SINGLE FAMILY DEVELOPMENT PROGRAM

10 TAC §§23.70 - 23.72

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 23, Subchapter G, §§23.70 - 23.72, concerning Single Family Development Program. Section 23.70 and §23.71 are adopted with changes to the proposed text as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5928). Section 23.72 is adopted without changes and will not be republished.

REASONED JUSTIFICATION. The Department recently underwent a reorganization which separated the HOME Division into single family and multifamily areas. The 2010 HOME rule at 10 TAC Chapter 53 did not allow for the single family and multifamily areas to effectively administer their activities with autonomy. Additionally, the Single Family HOME rules required updates which aligned more closely with the other Single Family programs, and new 10 TAC Chapter 20 specifically. Therefore, a repeal of portions of the HOME Rule at 10 TAC Chapter 53 and an adopted new Single Family HOME Program at 10 TAC Chapter 23 were necessary.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

In addition to the summary of public comment and staff response, the sections as recommended for adoption, include administrative clarifications and minor clerical corrections to references and punctuation. After each comment title, numbers are shown in parentheses. These numbers refer to the person or entity that made the comment as reflected in the Addendum. If comment resulted in recommended language changes to the draft rule as presented to the Board in July, such changes are indicated.

The Department accepted public comments between August 10, 2012 and September 10, 2012 with comments received from (12) Equal Voice Network Housing Coalition.

§23.70(3)(C). Single Family Development (SFD) Threshold and Selection Criteria. (12)

COMMENT SUMMARY: Commenter (12) requested that garbage collection services be removed from the list of utilities that must be documented as available in single family developments.

STAFF RESPONSE: The Department requires garbage collection services to be provided to single family developments funded with HOME funds; therefore, no changes were recommended based on these comments.

§23.71(d)(2). Single Family Development Unit Amenities. (12)

COMMENT SUMMARY: Commenter (12) recommended elimination of the requirement to provide blinds or window coverings for all windows as one of the required amenities in units constructed with HOME single family development funds because some families do not want window coverings or blinds.

STAFF RESPONSE: The list of amenities required for single family development is designed to construct an energy efficient dwelling ready for occupancy; therefore, no changes were recommended based on these comments.

§23.41(d)(1) and §23.71(i)(2). Front End Ratios. (3)(5)(7)(9)(10)(11)

COMMENT SUMMARY: The amount of down payment assistance provided under the home buyer assistance program is restricted to the amount necessary such that the total housing payment is at least 20 percent of the applicant's gross income. Commenter (3) recommended eliminating or reducing the front end ratio to 15 percent of the gross income of applicants requesting down payment assistance. Commenters (5), (7), and (9) recommended elimination or reduction of the ratio of income to total house payment (front end ratio) or to allow the FHA approved debt ratios or the first lien lender to determine both the front and back end ratios according to their lending requirements. Commenters (5) and (9) suggested the ratio be reduced from 20 percent to 15 percent. Commenter (11) recommended elimination of the front end ratio altogether. Commenter (7) recommended an alternative suggestion that HOME down payment assistance is offered equal to 20 percent of the sales price up to a maximum of $20,000. In addition, it was suggested that the HOME assistance be calculated prior to the addition of other down payment assistance or forgiveness of loans. Commenter (10) requested a waiver of the front end ratio to accommodate very low income households.

STAFF RESPONSE: The front end ratio was established in the 2010 HOME Rules at 25 percent of gross monthly income to satisfy HUD's requirement in 24 CFR §92.250 that HOME funds are used prudently and do not result in more subsidy than necessary to make the unit affordable to the homebuyer. The rule as proposed and published in the *Texas Register* reduced the required front-end ratio to from 25 percent to 20 percent of gross monthly income in response to comments received by administrators prior to the rulemaking process; therefore, staff did not recommend further reduction of the front-end ratio. No support documentation was provided by Commenter (3) to indicate that a reduction of the front end ratio to 15 percent would be reasonable and necessary to assist low income homebuyers; therefore, staff did not recommend that assistance be based on a percentage of the purchase price of the unit because that method does not account for individual circumstances and loan terms. Staff did not recommend waivers of the front end ratio for very low income households when the 20 percent front end ratio is lower than the standard established in the rental industry of 30 percent. HUD has determined that it is reasonable and affordable in rental housing programs which target very low and extremely low income households, such as the Section 8 Housing Choice Voucher Program, for households to pay 30 percent of their income towards rent. No changes were recommended based on these comments.

The Board approved the final order adopting the new sections including non-substantive technical corrections, on October 9, 2012.

STATUTORY AUTHORITY. The new sections are adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

§23.70. Single Family Development (SFD) Threshold and Selection Criteria.

All Applicants and Applications must submit or comply with this section.

(1) An Application for Community Housing Development Organization (CHDO) certification.

(2) If the total of Department loans equals more than 50 percent of the total development cost, except for developments also financed with U.S. Department of Agriculture (USDA) funds, the Applicant must provide:

(A) evidence of a line of credit or equivalent tool equal to at least 10 percent of the total development cost from a financial institution that is available for use during the proposed development activities; or

(B) a letter from a third party Certified Public Accountant (CPA) verifying the capacity of the owner or developer to provide at least 10 percent of the total development cost as a short term loan for development; and

(C) a letter from the developer's or owner's bank(s) confirming funds amounting to 10 percent of the total development cost are available.

(3) A proposed development plan that is consistent with the requirements of this chapter, all other federal and state rules, and includes:

(A) a floor plan and front exterior elevation for each proposed unit which reflects the exterior building composition;

(B) a FEMA Issued Flood Map that identifies the location of the proposed site(s);

(C) letters from local utility providers, on company letterhead, confirming each site has access to the following services: water and wastewater, sewer, electricity, garbage disposal and natural gas, if applicable;

(D) documentation of site control of each proposed lot: A recorded warranty deed with corresponding executed settlement statement; or a contract or option for the purchase of the proposed lots that is valid for at least one hundred-twenty (120) days from the date of application submission; and

(E) an "as vacant" appraisal of at least one of the proposed lots if: The Applicant has an Identity of Interest with the seller or current owner of the property; or any of the proposed property is part of a newly developed or under-development subdivision in which at least three other third-party sales cannot be evidenced. The purchase price of any lot in which the current owner has an identity of interest must comply with the identity of interest transfer requirements in Chapter 10, Subchapter D of this title (relating to Underwriting and Loan Policy).

(4) The Department may prioritize Applications or otherwise incentivize Applications that partner with other lenders to provide permanent purchase money financing for the purchase of units developed with funds provided under this subchapter.

§23.71. Single Family Development (SFD) Program Requirements.

(a) Eligible activities include the acquisition and New Construction or acquisition and Rehabilitation of single family housing. Single family housing units assisted with HOME funds must comply with the required affordability requirements as defined at 24 CFR §92.254.

(b) This Activity is a CHDO-eligible activity.

(c) The Household's income must not exceed 80 percent area median family income (AMFI) and the Household must complete a homebuyer counseling program/class.

(d) Each unit must meet the design and quality requirements described in paragraphs (1) - (5) of this subsection:

(1) for New Construction and Reconstruction, current applicable International Residential Code, local codes, rehabilitation

standards, ordinances, and zoning ordinances in accordance with the 24 CFR §92.251(a);

(2) include the following amenities: Wired with RG-6 COAX or better and CAT3 phone cable or better to each bedroom and living room; Blinds or window coverings for all windows; Disposal and Energy-Star or equivalently rated dishwasher (must only be provided as an option to each Household); Oven/Range; Exhaust/vent fans (vented to the outside) in bathrooms; Energy-Star or equivalently rated lighting in all rooms, which may include compact florescent bulbs. The living room and each bedroom must contain at least one ceiling lighting fixture and wiring must be capable of supporting ceiling fans; and Paved off-street parking for each unit to accommodate at least one mid-sized car and access to on-street parking for a second car;

(3) contain no less than two bedrooms. Each unit must contain complete physical facilities and fixtures for living, sleeping, eating, cooking, and sanitation;

(4) each bedroom must be no less than 100 square feet; have a length or width no less than 8 feet; be self contained with a door; have at least one window that provides exterior access; and have at least one closet that is not less than 2 feet deep and 3 feet wide and high enough to contain at least 5 feet of hanging space; and

(5) be no less than 800 total net square feet for a two bedroom home; no less than 1,000 total net square feet for a three bedroom and two bathroom home; and no less than 1,200 total net square feet for a four bedroom and two bathroom home.

(e) The total hard construction costs are limited as described in paragraphs (1) and (2) of this subsection:

(1) Reconstruction and New Construction of site-built housing: The hard construction costs are limited to $78 per square foot and $85,000 or for Households of 6 or more Persons $90,000; and

(2) Rehabilitation that is not Reconstruction: $40,000.

(f) Developer fees (including consulting fees) are limited to 15 percent of the total hard construction costs.

(g) Construction period financing for each unit shall be structured as a 0 percent interest loan with a six (6) month term. The maximum construction loan amount may not exceed the total sales price less developer fees/profit, homebuyer closing costs, and other ineligible Project costs. Prior to construction loan closing, a sales contract must be executed with a qualified homebuyer.

(h) In the instance that the Combined Loan to Value equals more than 100 percent of the appraised value, the portion of the sales price that exceeds 100 percent of the appraised value will be granted to the developer to buy down the purchase price if the homebuyer is receiving downpayment assistance or a first lien mortgage from the Department.

(i) The HOME assistance to the homebuyer shall be structured as a first and/or second lien loan(s):

(1) the downpayment assistance is limited to $20,000 and shall be structured as a fifteen (15) year deferred, forgivable loan with a subordinate lien; and

(2) a first lien conventional mortgage not provided by the Department must meet the mortgage financing requirements applicable to §23.41 of this chapter (relating to Homebuyer Assistance (HBA) Program Requirements). If the Department is providing the first lien mortgage with HOME financing, the loan will be fully amortizing with a thirty (30) year term. The Department will require a debt to income ratio (back-end ratio) not to exceed 45 percent. The total estimated housing payment (including principal, interest, property taxes, and insurance) shall be no less than 20 percent and no greater than 30 percent of the Household's gross monthly income. Should the estimated housing payment be less than 20 percent of the Household's gross income, the Department shall reduce the amount of downpayment assistance and/or charge an interest rate to the homebuyer such that the total estimated housing payment is no less than 20 percent of the homebuyer's gross income. In no instance shall the interest rate charged to the homebuyer exceed 5 percent. The Department shall use to the Household's income certification to make this determination.

(j) Earnest money is limited to no more than $500, which will be credited to the homebuyer at closing. HOME funds may be used to pay other reasonable and customary closing costs that are HOME eligible costs.

(k) If a Household should become ineligible or otherwise cease participation and a replacement Household is not located within ninety (90) days of the end of the construction period, all additional funding closings and draws on the award will cease and the Department will require the Applicant to repay any outstanding construction debt in full.

(l) The Division Director may approve the use of alterative floor plans or lots from those included in the approved Application, provided the requirements of this section can still be met and such changes do not materially affect the total budget.

(m) To ensure affordability, the Department will impose resale or recapture provisions established in this chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 11, 2012.

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Timothy K. Irvine
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For further information, please call: (512) 475-3916

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SUBCHAPTER H. APPLICATION AND CERTIFICATION OF COMMUNITY HOUSING DEVELOPMENT ORGANIZATIONS

10 TAC §23.80

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 23, Subchapter H, §23.80, concerning Application and Certification of Community Housing Development Organizations, with changes to the proposed text as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5931).

REASONED JUSTIFICATION. The Department recently underwent a reorganization which separated the HOME Division into single family and multifamily areas. The 2010 HOME rule at 10 TAC Chapter 53 did not allow for the single family and multifamily areas to effectively administer their activities with autonomy. Additionally, the Single Family HOME rules required updates which

aligned more closely with the other Single Family programs, and new 10 TAC Chapter 20 specifically. Therefore, a repeal of portions of the HOME Rule at 10 TAC Chapter 53 and an adopted new Single Family HOME Program at 10 TAC Chapter 23 was necessary.

The Department accepted public comments between August 10, 2012 and September 10, 2012. Comments regarding the new section were accepted in writing and by fax. No comments were received concerning the new section, however, Staff made non-substantive corrections to §23.80(a)(8)(B).

The Board approved the final order adopting the new section including non-substantive technical corrections, on October 9, 2012.

STATUTORY AUTHORITY. The new section is adopted pursuant to the authority of Texas Government Code, §2306.053 which authorizes the Department to adopt rules.

§23.80. Application Procedures for Certification of Community Housing Development Organization (CHDO).

(a) An Applicant requesting certification as a CHDO must submit an application for CHDO certification in a form prescribed by the Department. The CHDO Application must be submitted with an Application for HOME funding under the CHDO Set-Aside and the CHDO must be a sponsor, developer, or owner of the Development within the meaning ascribed by U.S. Department of Housing and Urban Development (HUD) for the Activity being performed. An Applicant shall not receive more than one award of CHDO operating funds during the same fiscal year of the Department regardless of the number of Applications submitted. Any such award is limited to $50,000. The Application must include documentation evidencing the requirements of 24 CFR Part 92 and this subsection:

(1) all Applications shall include the documents described in subparagraphs (A) - (C) of this paragraph, as applicable which shall be reviewed for compliance with federal and state requirements:

(A) Bylaws with date of board approval;

(B) Charter; and

(C) Certificate of Formation;

(2) the Applicant must be organized as a private nonprofit organization under the Texas Business Code or other state not-for-profit/nonprofit statute as evidenced by the documents required under paragraph (1) of this subsection;

(3) the Applicant must be registered with the Office of the Secretary of State to do business in the State of Texas;

(4) the Applicant must have the tax status described in subparagraphs (A) and (B) of this paragraph:

(A) a current tax exemption ruling from the Internal Revenue Service Code (IRS) under §501(c)(3), a charitable, nonprofit corporation, or under IRS §501(c)(4), a community or civic organization, of the Internal Revenue Code of 1986, as evidenced by a certificate from the IRS that is dated 1986 or later. The exemption ruling must be effective on the date of the Application and must continue to be effective while certified as a CHDO; or

(B) classification as a subordinate of a central organization nonprofit under the Internal Revenue Code, as evidenced by a current group exemption letter, that is dated 1986 or later, from the IRS that includes the Applicant. The group exemption letter must specifically list the Applicant; and a private nonprofit organization's pending application for IRS §501(c)(3) or (4) status cannot be used to comply with the tax status requirement under this subparagraph;

(5) the Applicant must have among its purposes the provision of decent housing that is affordable to low and moderate income people as evidenced by the documents required in paragraph (1) of this subsection or a business plan which outlines the CHDO's plans for developing affordable housing, providing services to each of the areas included within the service area, and internal operations;

(6) the Applicant must have a clearly defined service area that may encompass an entire "community" as defined in 24 CFR §92.2 under Community Housing Development Organization. The service area must be delineated in the entity's organizational documents;

(7) an Applicant must have the capacity and experience described in subparagraphs (A) - (C) of this paragraph:

(A) conforms to the financial accountability standards of 24 CFR §84.21, "Standards of Financial Management Systems" as evidenced by:

(i) a notarized statement by the Chief Executive Officer or Chief Financial Officer of the organization in a form prescribed by the Department;

(ii) a certification from a Certified Public Accountant; or

(iii) a HUD-approved audit summary; and

(iv) a written narrative describing internal controls used to create financial duties and safe guard corporate assets; and

(v) a written narrative describing the conflict of interest policy governing employees and development activities and procurement; and

(vi) a written narrative describing the current corporation's financial structure can support housing development activities; and

(vii) a written narrative describing the organization's ability to manage additional rental development activities, if applicable;

(B) demonstrated capacity for carrying out activities assisted with HOME funds, as evidenced by:

(i) documentation that describes the experience of key staff members who have successfully completed projects similar to those to be assisted with HOME funds; or

(ii) Contract(s) with consultant firms or individuals who have housing experience similar to projects to be assisted with HOME funds, to train appropriate key staff of the organization;

(C) has a history of serving the low income residents of the city or county in which housing to be assisted with HOME funds is to be located as evidenced by:

(i) documentation of at least one year of experience providing services; or

(ii) for newly created organizations formed by local churches, service or community organizations, a statement that documents that its parent organization has at least one year providing services; and

(iii) the documentation provided in clause (i) or (ii) of this subparagraph must document and describe the organization's history (or its parent organization's history) of serving the city or county, such as, developing new housing, rehabilitating existing housing stock and managing housing stock, or delivering non-housing services that have had lasting benefits for those receiving services, such as counseling, food relief, or childcare facilities. The statement

in the submission package must be signed by the president or other official of the organization;

(8) an Applicant must have an organizational structure that meets the federal requirements in 24 CFR §92.2. Compliance with this paragraph shall be evidenced by:

(A) a written provision or statement in the organizations Bylaws, Charter, or Certificate of Formation;

(B) an affidavit signed by the organization's Chief Executive Officer; and

(C) a current roster of all Board of Directors, including names and mailing addresses. The required one-third low-income residents or elected representatives must be marked on list as such;

(9) the Applicant must provide a formal process for low-income individuals, including potential program beneficiaries to advise the organization in all of its decisions regarding the design, siting, development, and management of affordable housing projects. The formal process should include a system for community involvement in parts of the private nonprofit organization's service areas where housing will be developed, but which are not represented on its boards. Input from the low-income community is not met solely by having low-income representation on the board. The formal process must be in writing and approved or adopted by the private nonprofit organization, as evidenced by:

(A) an organization's Bylaws; or

(B) A written statement of operating procedures approved by the governing body. Statement must be original letterhead, signed by the Chief Executive Officer and evidence date of board approval; and

(C) a Resolution with evidence of date of board approval;

(10) if the CHDO's creation was sponsored by a for-profit organization the for-profit entity's primary purpose cannot include the development or management of housing, as evidenced in the for-profit organization's Bylaws. If an Applicant is associated or has a relationship with a for-profit entity or entities, the CHDO must prove it is not controlled, nor receives directions from individuals, or entities seeking profit as evidenced by the documentation required in paragraph (1) of this subsection or a memorandum of understanding or similar agreement; and

(11) CHDOs that are in partnership agreements associated with the Development must maintain effective Control and decision making control over the Development. All legally binding ownership and/or partnership agreements must clearly state the CHDO's role in the Development, as evidenced by an affidavit from the CHDO and any other developer, general partner, or special limited partner (except for entities related to a tax credit investor limited partner) that the CHDO will maintain effective Control and decision making control over the Development. In addition, the CHDO or entity wholly owned by the CHDO must receive at least 50 percent of the cashflow from the property (for multifamily developments) or 50 percent of the developer fee which must also be evidenced by the affidavit.

(b) An Application for CHDO Certification will only be accepted if submitted with an Application to the Department for HOME funds. If all requirements under this section are met, the Applicant will be certified as a CHDO upon the award of HOME funds by the Department. A new Application for CHDO certification must be submitted to the Department with each new Application for HOME funds under the CHDO Set-Aside.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 24. TEXAS BOOTSTRAP LOAN PROGRAM RULE

10 TAC §§24.1 - 24.13

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 24, §§24.1 - 24.13, concerning the Texas Bootstrap Loan Program Rule. The Department adopts §§24.3, 24.4, 24.7 - 24.9, and 24.12 with changes to the proposed text as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5933). Sections 24.1, 24.2, 24.5, 24.6, 24.10, 24.11, and 24.13 are adopted without changes and will not be republished. The changes to the proposed rule text are non-substantive corrections. In addition, the chapter title was revised from Bootstrap Loan Program Rule to Texas Bootstrap Loan Program Rule.

REASONED JUSTIFICATION: Recently the Department reorganized and restructured all of its housing and community affairs programs. Part of the purpose of the reorganization was to separate single and multi-family housing program delivery and to standardize much of the single family housing program procedures. These changes were implemented for the purpose of improving the delivery of housing solutions to Texans. This rule accomplishes those goals by better aligning the Bootstrap Loan Program with the new 10 TAC Chapter 20, concerning the Single Family Programs Umbrella Rule.

The Department accepted public comments between August 10, 2012 and September 10, 2012. Comments regarding the new sections were accepted in writing and by fax. No comments were received concerning the new chapter.

The Board approved the final order adopting the new sections, as well as other non-substantive corrections, on October 9, 2012.

STATUTORY AUTHORITY: The new sections are adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules. Additionally, the new sections are adopted pursuant to Texas Government Code, Chapter 2306, Subchapter FF, which specifically authorizes the Department to administer the Texas Bootstrap Loan Program.

§24.3. Allocation of Funds.

(a) The Department administers all Texas Bootstrap Loan Program funds provided to the Department in accordance with Texas Government Code, Chapter 2306, Subchapter FF. The Department shall solicit gifts and grants to make loans under this chapter.

(b) The Department may also make loans under this chapter from:

(1) available funds in the housing trust fund established under Texas Government Code, §2306.201;

(2) federal block grants that may be used for the purposes of this chapter; and

(3) the Owner-Builder revolving loan fund established under Texas Government Code, §2306.7581.

(c) The Department shall establish an Owner-Builder revolving loan fund for the sole purpose of funding loans pursuant to Texas Government Code, §2306.7581.

(d) The Department shall deposit money received in repayment of a loan to the Owner-Builder revolving loan fund pursuant to Texas Government Code, §2306.7581.

(e) Each state fiscal year the Department shall transfer at least $3 million to the Texas Bootstrap Loan Program revolving fund from money received under the federal HOME Investment Partnerships program established under Title II of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. §§12701, et seq.), from money in the housing trust fund; or from money appropriated by the legislature to the Department pursuant to Texas Government Code, §2306.7581.

(f) In a state fiscal year the Department may use not more than 10 percent of the revenue available to enhance the ability of tax-exempt organizations described by Texas Government Code, §2306.755(a) to enhance the number of such organizations that are able to implement the Program. The Department shall use that available revenue to provide financial assistance, technical training and management support.

§24.4. Participant Requirements.

(a) Eligible Participants. The following organizations or entities are eligible to participate in the Texas Bootstrap Loan Program:

(1) Colonia Self Help Centers established under Texas Government Code, Chapter 2306, Subchapter Z; or

(2) Nonprofit Owner-Builder Housing Provider (NOHP) certified by the Department pursuant to Texas Government Code, §2306.755.

(b) Eligibility requirements. Participant must be certified as an NOHP or must be a Colonia Self-Help Center and must have entered into a Loan Origination Agreement with the Department in order to be eligible to participate in the Texas Bootstrap Loan Program. The Participant must have the capacity to administer and manage resources as evidenced by previous experience of managing state and/or federal programs.

§24.7. Distribution of Funds.

(a) Set-Asides. In accordance with Texas Government Code, §2306.753(d), at least two-thirds (2/3) of the dollar amount of loans made under this chapter in each fiscal year must be made to Owner-Builders whose property is located in a census tract that has a median household income that is not greater than 75 percent of the median state household income for the most recent year for which statistics are available.

(b) Balance of State. The remaining one-third (1/3) of the dollar amount of loans may be made to Owner-Builders statewide.

(c) Once a Reservation has been awarded, the Department may grant one forty-five (45) day extension of required benchmarks due to extenuating circumstances that were beyond the Owner-Builder's and/or the NOHPs control. If the NOHP cannot meet the required benchmarks after the forty-five (45) day extension, the Reservation will be cancelled. If funds are available the NOHP may receive another Reservation on the same Owner-Builder applicant and the NOHP must submit an updated application to ensure the Owner-Builder applicant still meets all guidelines and requirements under Texas Bootstrap Loan Program Rule and Program Manual.

§24.8. Criteria for Funding.

(a) The Department will distribute the funds in accordance with the Texas Housing Trust Fund (HTF) Plan in effect at the time. The Department will publish an announcement for a Notice of Funding Availability (NOFA) in the *Texas Register* and post the NOFA on the Department's website. The NOFA will establish and define the terms and conditions for the submission of Reservations and/or applications. The Department may also set a deadline for receiving Reservations and/or applications. The NOFA will also indicate the approximate amount of available funds. The Department may increase funds in the NOFA from time to time without republishing the NOFA in the *Texas Register* and Department's website.

(b) A nonprofit organization must have been certified by the Department as a Nonprofit Owner-Builder Housing Provider (NOHP) and must have executed a Loan Origination Agreement to be eligible to submit a Reservation on behalf of an Owner-Builder applicant. A Reservation containing false information will be disqualified. The Department will review and process all Owner-Builder applications in the order received. The NOHP will be notified in writing of the Department's determination.

(c) Reservations received by the Department in response to a NOFA will be handled as described in paragraphs (1) - (6) of this subsection.

(1) The Department will accept Reservations until all funds under the NOFA have been committed. The Department may limit the eligibility of Reservations in the NOFA.

(2) Each Reservation will be assigned a "received date" based on the date and time the Reservation was entered into the Texas Bootstrap Loan Program Reservation system. Each Reservation will be reviewed in accordance with the Program rules.

(3) Reservations and/or applications submitted on behalf of an Owner-Builder applicant must comply with all applicable Texas Bootstrap Loan Program requirements or regulations established in this chapter. Reservations and/or applications submitted on behalf of an Owner-Builder applicant that do not comply with such requirements may be disqualified. The NOHP will be notified in writing of any cancelled and/or disqualified Reservations and/or applications submitted on behalf of an Owner-Builder applicant.

(4) If a Reservation contains administrative deficiencies which, in the determination of the Department, require clarification or correction of information submitted at the time of the Reservation, the Department may request clarification or correction of such Administrative Deficiencies. The Department may request clarification or correction in a deficiency notice in the form of an email, facsimile or a telephone call to the NOHP advising that such a request has been transmitted.

(5) Prior to issuing an applicant eligibility letter the Department may decline to fund any Reservation entered into the Reservation system if the proposed housing activities do not, in the Department's sole determination, represent a prudent use of the Department's funds. The Department is not obligated to proceed with any action pertaining to any Reservation which are entered, and may decide it is in the Department's best interest to refrain from committing the funds. If the Department has issued an applicant eligibility letter to the Owner-Builder

applicant, but the NOHP and/or Owner-Builder applicant has not complied with all the Program rules and guidelines, the Department may suspend funding until the NOHP and/or Owner-Builder applicant has satisfied all requirements of the Program. If the NOHP is unable to cure any deficiencies within fifteen (15) days, the Department may provide a one-time fifteen (15) day extension or decline to fund the Reservation.

(6) The Department will give priority to Reservations to Owner-Builders with an annual income of less than $17,500 and Reservations to Owner-Builders who will reside in counties and municipalities that agree in writing to waive the capital recovery fees, building permit fee or other fees related to the building of the houses to be built with the loan proceeds.

§24.9. Program Administration.

(a) Per household assistance from the Department for any Texas Bootstrap Loan Program loans may not exceed $45,000 per-household pursuant to Texas Government Code, §2306.754(b). The Owner-Builder must obtain the amount necessary that exceeds $45,000 from other sources of funds including other Department funds with the exception of funds being utilized to implement the Texas Bootstrap Loan Program. The total amount of Amortized repayable loans made by the Department and other entities to an Owner-Builder under the Program may not exceed $90,000 pursuant to Texas Government Code, §2306.754(b).

(b) The Department, through a Nonprofit Owner-Builder Housing Provider (NOHP), shall make loans for Owner-Builder applicants to enable them to:

(1) purchase or refinance real property on which to build new residential housing;

(2) build new residential housing; or

(3) improve existing residential housing.

(c) The NOHP will be granted a 6 percent administration fee upon completion of the house and closing of each mortgage loan.

(d) Upon approval by the Department, the nonprofit organization certified as an NOHP or Colonia Self-Help Centers shall enter into, execute, and deliver to the Department the Loan Origination Agreement.

(e) In the event the Department has additional funds in the same funding cycle, the Department, with Board approval, will distribute funds in accordance with this chapter.

(f) The Department may terminate the Loan Origination Agreement in whole or in part. If the NOHP has not achieved performance benchmarks as outlined in the NOFA, Loan Origination Agreement, and/or Program Manual. If the Owner-Builder applicant qualifies for the Program, the Department will issue an applicant eligibility letter (approval letter) which reserves the funds (up to $45,000 per Reservation) for twelve (12) months from the date of the applicant eligibility letter. Owner-Builder applicant will not be required to re-qualify for the Program if the Owner-Builder applicant closes on the loan on or before the expiration date stated on the applicant eligibility letter issued by the Department. If the Owner-Builder fails to close on the loan on or before the expiration date stated on the applicant eligibility letter, the Owner-Builder applicant will be required to re-qualify for the Program.

(g) Roles and responsibilities for administering the Program contract. NOHPs are required to:

(1) qualify potential Owner-Builders for loans;

(2) provide Owner-Builder homeownership education classes;

(3) supervise and assist Owner-Builders in building and/or rehabilitate housing;

(4) facilitate loans made or purchased by the Department under the Program; and

(5) implement and administer the Program on behalf of the Department.

(h) Loan Servicing Agreement. If the NOHP wishes to service the loans originated on behalf of the Department it must enter into a Loan Servicing Agreement with the Department. The Department may grant the request upon reviewing the NOHP capacity to implement those specific functions.

(i) First Year Consultation Agreement. The NOHP agrees that if notified by the Department that Owner-Builder has failed to make a scheduled payment due under the Program loan, or other payments due under the Program loan documents issued under the Program, within the first twelve (12) months of funding, the NOHP will be required to meet with the Owner-Builder and provide counseling and assistance until the payments are made current. After consultation and in the event that the Department and NOHP are not able to reach a consensus about NOHPs effort to bring the Program loan current as required under this chapter, the Department in accordance with its administrative rules may apply appropriate graduated sanctions leading up to, but not limited to deobligation of funds and future debarment from participation in the Program.

(j) Administrative Fee. The NOHP may request their administrative fee upon completion of the house and closing of each mortgage loan.

(k) Blueprints. If NOHP's activity is interim or residential construction, NOHP must provide an original copy of the proposed blueprints to be approved by the Department prior to accepting applications. Blueprints must include the required construction requirements pursuant to Texas Government Code, §2306.514. All blueprints submitted for approval must be prepared and executed by an architect or engineer licensed by the state of Texas.

(l) Work Write-up. The NOHP must submit a work write-up for all rehabilitation projects. Work write-ups must be reviewed and approved by the Department, before rehabilitation is started.

(m) Loan Program requirements. The Department may purchase or originate loans that conform to the lending parameters and the specific loan Program requirements as described in paragraphs (1) - (13) of this subsection:

(1) maximum Loan amount not to exceed $45,000. If it is not possible for the Owner-Builder to purchase necessary real property and build adequate housing for $45,000, the NOHP must obtain additional funding from other sources of funds;

(2) minimum Loan amount is $1,000;

(3) the total amount of all Amortized repayable loans under the Program may not exceed $90,000. Deferred forgivable loans are not included in these total loan calculations;

(4) may not exceed a term of thirty (30) years;

(5) minimum loan term of five (5) years;

(6) zero percent (0 percent) non-interest loans;

(7) when refinancing a contract for deed, the Department will not disburse any portion of the Department's loan until the Owner-Builder receives a deed to the property;

(8) Owner-Builder(s) must have resided in this state for the preceding six (6) months prior to the date of loan application;

(9) Credit Qualifications. Owner-Builder applicants must have a credit history that indicates reasonable ability and willingness to meet debt obligations. In order for the Department to make a reasonable determination, the Department will obtain a tri-merge credit report on all Owner-Builder applicants submitted to the Department for approval;

(10) unacceptable credit includes, but is not limited to:

(A) payments on any open consumer, retail and/or installment account (i.e. auto loans, signature loans, payday loans, credit cards or any other type of retail and/or installment loan) which has been delinquent for more than thirty (30) days on three (3) or more occasions within the last twelve (12) months, unless the Owner-Builder applicant has been current for the four (4) months immediately preceding the application date. For purposes of this subparagraph, the credit history of an Owner-Builder who is a Domestic Farm Laborer and receives a substantial portion of his/her income from the production or handling of agriculture or aquacultural products will not apply. However, Owner-Builder must still demonstrate the ability and willingness to meet debt obligations;

(B) a foreclosure which has been completed within the last twelve (12) months prior to the date of loan application;

(C) an outstanding Internal Revenue Service tax lien or any other outstanding tax liens where Owner-Builder applicant has made formal and satisfactory payment arrangements for at least six (6) months prior to the date of loan application;

(D) a court-created or court-affirmed obligation or judgment caused by nonpayment that is currently outstanding must be paid off. The Department may consider this account in good standing if the Owner-Builder applicant has made formal and satisfactory payment arrangements for at least six (6) months prior to the date of loan application;

(E) any account (with the exception of a medical account) that has been placed for "collection," "profit and loss" or "charged off" within the last twelve (12) months prior to the date of loan application, unless the account has been or will be paid in full after receiving notice from the Department. If there are other, unpaid or unresolved accounts that were placed for "collection," "profit and loss," or "charged off" prior to the last twelve (12) months prior to the date of loan application then. Owner-Builder applicant must also have re-established at least one line of credit that must be in good standing with no delinquencies for at least six (6) months prior to the date of loan application. Type of debts that will be taken into consideration may include, but are not limited to the following: rental history, cell phone, utility, child care, auto insurance, etc.;

(F) any delinquency on any government debt unless the Owner-Builder applicant has made formal and satisfactory payment arrangements for at least six (6) months prior to the date of loan application;

(G) a bankruptcy that has been filed within the past twelve (12) months prior to the date of loan application;

(H) any delinquency on child support unless the Owner-Builder applicant has made formal and satisfactory payment arrangements for at least six (6) months prior to the date of loan application;

(11) subparagraphs (A) - (C) of this paragraph will not be considered indicators of unacceptable credit:

(A) a bankruptcy in which debts were discharged more than twelve (12) months prior to the date of loan application. Owner-Builder applicant must also have re-established at least one line of credit that must be in good standing with no delinquencies for at least six (6) months prior to the date of loan application. In addition the Owner-Builder applicant must submit to the Department a letter of explanation regarding the circumstances that led to the bankruptcy which is acceptable to the Department;

(B) where an Owner-Builder applicant has successfully completed a debt restructuring plan and has demonstrated a willingness to meet obligations when due for the six (6) months prior to the date of loan application. If an Owner-Builder applicant is currently participating in a debt management plan, the trustee or assignee must provide a letter to the Department stating that they are aware and agree with the Owner-Builder applicant applying for a mortgage loan. In addition Owner-Builder applicant must have successfully completed at least six (6) months of the debt management plan with no delinquent payments;

(C) medical accounts that are delinquent or that have been placed for collection;

(12) the Owner-Builder applicant's liabilities include all revolving charge accounts, real estate loans, alimony, child support, installment loans, and all other debts of a continuing nature with more than ten (10) monthly payments remaining. Debts for which the Owner-Builder applicant is a co-signer will be included in the total monthly obligations unless the other party to the debt provides evidence showing that the Owner-Builder applicant has not been making payments on the co-signed loans for the previous twelve (12) months. There may be no late payments within the past twelve (12) months or the debt will be included. Payments on installment debts which are paid off prior to funding are not included for qualification purposes. Payments on all revolving debts (e.g. credit cards, payday loans, lines of credit, unsecured loans) and certain types of installment loans that appear to be recurring in nature will be included in debt ratio calculation, even if the Owner-Builder applicant intends to pay off the accounts, since the Owner-Builder applicant can reuse those credit sources, unless the account is paid off and closed. Payments on any type of loan that have been deferred must be deferred for at least eighteen (18) months from the date of loan application in order for the debt not to be included in the debt ratio calculation; and

(13) the residence must be occupied as the Principal Residence of the Owner-Builder within thirty (30) days of the later of the end of the construction period or the closing of the loan. Any additional habitable structures must be removed from the property prior to closing. Portion of the former structure may be utilized as storage upon the Department's written approval prior to closing.

(n) Loan Assumption. A Program loan is assumable if the Department determines that the Owner-Builder applicant complies with all Program requirements in effect at the time of the assumption.

§24.12. Property Guidelines and Related Issues.

(a) If the Nonprofit Owner-Builder Housing Provider (NOHP) is utilizing Program funds to construct the home they must conform to Texas Government Code, §2306.514 and execute a Construction Loan Agreement.

(1) If the property is located outside an incorporated area inspections will be required to be completed by a professional inspector licensed by the Texas Real Estate Commission for all new construction and reconstruction projects. For all housing rehabilitation projects an

initial and final inspection will be required and completed by a licensed inspector.

(2) The NOHP and/or the Owner-Builder Applicant will be responsible for the selection and/or the fee of a licensed inspector.

(b) Appraisals are required by the Department on each property prior to funding.

(c) Loan to value ratio may not exceed 95 percent of the appraised value, the lien amounts of forgivable loans and/or grants will not be included in the loan-to-value calculation.

(d) Combined loan to value ratio may not exceed 100 percent of the appraised value, the lien amounts of forgivable loans will also be included in the combined loan to value ratio.

(e) Improvement Surveys are required on each property.

(f) Category 1A (Texas Society of Professional Surveyors) ("lot survey") are required for all interim and residential construction loans. Upon Department approval a recorded subdivision plat may be used in lieu of lot surveys for interim construction loans only. Upon completion of construction an improvement survey must also be provided.

(g) Title Commitment. A copy of the preliminary title report including complete legal description, and copies of covenants, conditions and restrictions, easements, and any supplements thereto is required. The preliminary title report should not be more than thirty (30) days old at the time the submission package (Submission or Funding Package) is sent to the Department.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Timothy K. Irvine
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For further information, please call: (512) 475-3916

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CHAPTER 25. COLONIA SELF-HELP CENTER PROGRAM RULE

10 TAC §§25.1 - 25.9

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 25, §§25.1 - 25.9, concerning the Colonia Self-Help Center Program Rule. Section 25.4 and §25.6 are adopted with changes to the proposed text as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5859). Sections 25.1 - 25.3, 25.5, and 25.7 - 25.9 are adopted without changes and will not be republished.

REASONED JUSTIFICATION: Recently the Department reorganized and restructured all of its housing and community affairs programs. Part of the purpose of the reorganization was to separate single and multi-family housing program delivery and to standardize much of the single family housing program procedures. These changes were implemented in order to improve the delivery of housing solutions to Texans. This rule accomplishes those goals by better aligning the Colonia Self-Help Center Program Rule with the new 10 TAC Chapter 20, Single Family Umbrella Programs Rule.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

The Department accepted public comments between August 10, 2012 and September 10, 2012. Comments regarding the new sections were accepted in writing and by fax. Comments were received from Ann Williams Cass, ED, Chair, Equal Voice Housing Coalition.

§25.3. Eligible and Ineligible Activities.

§25.3(a).

COMMENT SUMMARY. Commenter asked if the Department is purposely leaving out extremely low income families in this section.

STAFF RESPONSE: Texas Government Code, §2306.586, states that "the purpose of a self-help center is to assist individuals and families of low income and very low income...." Extremely low income families are eligible. No changes to the rule were recommended.

§25.3(a)(5).

COMMENT SUMMARY. Commenter asked whether infrastructure is needed besides water, wastewater disposal, etc. The rule should include street lights, sidewalks, and recreational areas so we can have healthy sustainable communities.

STAFF RESPONSE: Activities are limited by Texas Government Code, §2306.586. The proposed additions of allowable activities are not indicated in statute. Therefore, no changes to the rule were recommended.

§25.3(a)(12).

COMMENT SUMMARY. Commenter stated that providing monthly programs to educate individuals and families on their rights and responsibilities as property owners is good and asked which materials will be used and who will provide them.

STAFF RESPONSE: The Department does not intend to develop and distribute materials for classes. It is explicitly up to the county, nonprofit organization, or procured vendor to develop applicable materials. No changes to the rule were recommended.

§25.4(b)(2). Colonia Self-Help Centers Establishment.

COMMENT SUMMARY: Commenter stated that five Colonias in each service area are proposed to receive concentrated attention and requested that the rule be changed from three to five to better concentrate funds.

STAFF RESPONSE: The designation of five Colonias is required by Texas Government Code, §2306.583. No changes to the rule were recommended.

§25.5(c). Allocation and the Colonia Self-Help Center Application Requirements.

COMMENT SUMMARY: This section of the rule refers to situations in which violations are beyond the control of the contract administrator, they may request of the Board that the individual violation be waived for the purpose of future funding. Commenter stated that this language is good because it allows for weather conditions beyond the control of the contract administrator. (See §20.14(b) time extension.)

STAFF RESPONSE: Staff appreciated the comment. No changes to the rule were recommended.

§25.6. Colonia Residents Advisory Committee (C-RAC) Duties and Award of Contracts.

COMMENT SUMMARY: Commenter stated that C-RAC process needs to be re-thought and that staff should consider public hearings in the Colonias.

STAFF RESPONSE: The Colonia Resident Advisory Committee (C-RAC) duties and award of contracts is required by Texas Government Code, §2306.585. The members of the C-RAC are Colonias residents in the targeted Colonias that represent the needs of the Colonias and the meetings are open to the public. No changes to the rule were recommended.

§25.7(h)(1). Colonia Self-Help Center Contract Operation and Implementation.

COMMENT SUMMARY: Commenter requested a time extension beyond the four year contract.

STAFF RESPONSE: The four-year time period is required by Texas Government Code, §2306.587. No changes to the rule were recommended.

§25.8. Administrative Threshold.

COMMENT SUMMARY: Commenter stated that the timeline for thresholds should not start until the contract is signed.

STAFF RESPONSE: The contract start date is the day the Department's board approves an award. On that date, eligible administrative costs may begin to be incurred and reimbursed once a fully executed contract is in place. The first threshold requires the submission of the environmental assessment within six months of the start date; environmental clearance is required to begin before any construction activities. No changes to the rule were recommended.

The Board approved the final order adopting the new sections, as well as non-substantive technical corrections, on October 9, 2012.

STATUTORY AUTHORITY: The new sections are adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

§25.4. Colonia Self-Help Centers Establishment.

(a) Pursuant to Texas Government Code, §2306.582, the Department has established Colonia Self-Help Centers in El Paso, Hidalgo, Starr, Webb, Cameron (also serves Willacy), Maverick, and Val Verde Counties.

(b) The Department shall designate:

(1) appropriate staff in the Department to act as liaison to the Colonia Self-Help Centers to assist the centers in obtaining funding to enable the centers to carry out the center's programs;

(2) five (5) colonias in each service area to receive concentrated attention from the Colonia Self-Help Centers in consultation with the CRAC and the appropriate unit of local government; and

(3) a geographic area for the services provided by each Colonia Self-Help Center.

(c) The Department shall make a reasonable effort to secure:

(1) contributions, services, facilities, or operating support from the county commissioner's court of the county in which a Colonia Self-Help Centers is located which it serves to support the operation of that Colonia Self-Help Center; and

(2) an adequate level of funding to provide each Colonia Self-Help Center with funds for low interest mortgage financing, grants for self-help programs, revolving loan fund for septic tanks, a tool lending program, and other activities the Department determines are necessary.

(d) The El Paso Colonia Self-Help Center shall establish a technology center to provide internet access to colonia residents pursuant to the General Appropriations Act.

§25.6. Colonia Residents Advisory Committee Duties and Award of Contracts.

(a) The Board shall appoint not fewer than five (5) persons who are residents of colonias to serve on the CRAC. The members of the CRAC shall be selected from lists of candidates submitted to the Department by local nonprofit organizations and the commissioner's court of a county in which a Colonia Self-Help Center is located.

(b) The CRAC members' terms will expire every four (4) years. CRAC members may be reappointed by the Board; however, the Board shall review and approve all members at least every four (4) years.

(c) The Board shall appoint one committee member to represent each of the counties in which a Colonia Self-Help Center is located. Each committee member:

(1) must be a resident of a colonia in the county the member represents; and

(2) may not be a board member, contractor, or employee of or have any ownership interest in an entity that is awarded a Contract under this chapter and cannot be in default on any Department obligation.

(3) The Department will conduct a compliance check on all members.

(d) The Department may also select to have an alternate member from the list for each county in the event that the primary member is unable to attend meetings.

(e) The Colonia Resident Advisory Committee shall advise the Board regarding:

(1) the housing needs of colonia residents;

(2) appropriate and effective programs that are proposed or are operated through the Colonia Self-Help Centers; and

(3) activities that might be undertaken through the Colonia Self-Help Centers to serve the needs of colonia residents.

(f) The CRAC shall advise the colonia initiatives coordinator as provided by Texas Government Code, §775.005.

(g) Award of Contracts.

(1) Upon reaching an agreement with the Contract Administrator, the Department will set the date for the CRAC meeting. The CRAC shall meet before the 30th calendar day proceeding the date on which a contract is scheduled to be awarded by the Board for the operation of a Colonia Self-Help Center and may meet at other times.

(2) The Contract Administrator shall be present at the CRAC if its Application is being considered to answer questions that CRAC may have.

(3) After the CRAC makes a recommendation on an Application, the recommendation will undergo the Department's award process.

(h) Reimbursement of CRAC members for their reasonable travel expenses in the manner provided by §25.8(1) of this chapter (relating to Administrative Thresholds) is allowable and shall be paid by the Contract Administrator.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 26. TEXAS HOUSING TRUST FUND RULE

10 TAC §§26.1 - 26.7

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 26, §§26.1 - 26.7, concerning the Texas Housing Trust Fund Rule. Sections 26.1, 26.3, and 26.5 are adopted with changes to the proposed text as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5944). Sections 26.2, 26.4, 26.6, and 26.7 are adopted without changes and will not be republished. In addition, the chapter title was amended from Housing Trust Fund Program Rule to Texas Housing Trust Fund Rule.

REASONED JUSTIFICATION. Recently the Department reorganized and restructured all of its housing and community affairs programs. Part of the purpose of the reorganization was to separate single and multi-family housing program delivery and to standardize much of the single family housing program procedures. These changes were implemented for the purpose of improving the delivery of housing solutions to Texans. The Department finds that the new sections align the Housing Trust Fund Program with the new 10 TAC Chapter 20, Single Family Umbrella Programs Rule.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

The Department accepted public comments between August 10, 2012 and September 10, 2012. Comments regarding the new sections were accepted in writing and by fax. Comments were received from Charles Cloutman, Meals on Wheels and More.

Chapter 26 - General: No specific part of the proposed rule was referenced in comment.

COMMENT SUMMARY: Commenter suggested that the project limit should be raised to $30,000 with a minimum of 51% used for accessibility issues and the remaining 49% used for structural or life safety issues at the home.

STAFF RESPONSE: Depending on funding availability, the recommendations concerning eligible activities will be taken into account in the next Amy Young Barrier Removal Program NOFA. No changes were recommended based on this comment.

§26.3. Allocation of Funds.

COMMENT SUMMARY: Commenter requested the inclusion of a statutory mandate for funding of the Amy Young Barrier Removal Program, similar to the Department's Bootstrap Program, because a mandate would allow program administrators to build necessary staff by having the knowledge that funding will be available across the state to serve low-income persons with disabilities.

STAFF RESPONSE: Only the Texas Legislature has the authority to enact statutes. The Department's authority is limited to implementing those statutes through rulemaking. No changes were recommended based on this comment.

The Board approved the final order adopting the new sections, as well as non-substantive technical corrections, on October 9, 2012.

STATUTORY AUTHORITY. The new sections are adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules and pursuant to Texas Government Code, §2306.141, which specifically authorizes the Department to promulgate rules to implement its housing programs.

§26.1. Purpose.

This chapter clarifies the administration of the Texas Housing Trust Fund Program (HTF). The HTF provides loans, grants or other comparable forms of assistance to income-eligible individuals, families and households. The HTF is administered in accordance with Texas Government Code, Chapter 2306 and Chapter 20 of this title (relating to Single Family Programs Umbrella Rule).

§26.3. Allocation of Funds.

(a) The Department administers all HTF funds provided to the Department in accordance with Texas Government Code, Chapter 2306. The Department may solicit gifts and grants to endow the fund.

(b) Pursuant to Texas Government Code, §2306.202(b), use of the HTF is limited to providing:

(1) assistance for individuals and families of low and very low income;

(2) technical assistance and capacity building to nonprofit organizations engaged in developing housing for individuals and families of low and very low income;

(3) security for repayment of revenue bonds issued to finance housing for individuals and families of low and very low income; and

(4) subject to the limitations in Texas Government Code, §2306.251, the Department may also use the fund to acquire property to endow the fund.

(c) Regional Allocation. Funds shall be allocated to achieve broad geographic dispersion by awarding funds in accordance with Texas Government Code, §2306.111(d) and (g).

(d) Set-Asides. In accordance with Texas Government Code, §2306.202(a) and program guidelines:

(1) in each biennium, the first $2.6 million available through the HTF for loans, grants, or other comparable forms of assistance shall be set aside and made available exclusively for Local

Units of Government, Public Housing Authorities, and Nonprofit Organizations;

(2) any additional funds may also be made available to for-profit organizations provided that at least 45 percent of available funds, as determined on September 1 of each state fiscal year, in excess of the first $2.6 million shall be made available to Nonprofit Organizations; and

(3) the remaining portion shall be distributed to Nonprofit Organizations, for-profit organizations, and other eligible entities, pursuant to Texas Government Code, §2306.202.

§26.5. Prohibited Activities.

(a) The activities described in paragraphs (1) - (7) of this subsection are prohibited in relation to the origination of a HTF loan, but may be charged as an allowable cost by a third (3rd) party lender for the origination of all other loans originated in connection with an HTF loan:

(1) payment of delinquent property taxes or related fees or charges on properties to be assisted with HTF funds;

(2) loan origination fees;

(3) application fees;

(4) discount fees;

(5) underwriter fees;

(6) loan processing fees; and

(7) other fees not approved by the Department in writing prior to expenditure.

(b) Persons receiving or benefiting from HTF funds, as determined by the Department, may not be currently in delinquency or in default with child support and/or government loans.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 27. TEXAS FIRST TIME HOMEBUYER PROGRAM RULE

10 TAC §§27.1 - 27.10

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 27, §§27.1 - 27.10, concerning Texas First Time Homebuyer Program Rule. Section 27.2 is adopted with changes to the proposed text as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5946). Section 27.1 and §§27.3 - 27.10 are adopted without changes and will not be republished.

REASONED JUSTIFICATION. Recently the Department reorganized and restructured all of its housing and community affairs programs. Part of the purpose of the reorganization was to separate single and multi-family housing program delivery and to standardize much of the single family housing program procedures. These changes were implemented for the purpose of improving the delivery of housing solutions to Texans. The Department finds that the new chapter aligns the First Time Homebuyer Program with new 10 TAC Chapter 20, concerning the Single Family Programs Umbrella Rule.

The Department accepted public comments between August 10, 2012, and September 10, 2012. Comments regarding the new sections were accepted in writing and by fax. No comments were received concerning the new sections.

The Board approved the final order adopting the new sections including non-substantive technical corrections, on October 9, 2012.

STATUTORY AUTHORITY. The new sections are adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules and pursuant to Texas Government Code, §2306.141, which specifically authorizes the Department to promulgate rules concerning the Department's housing programs.

§27.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings unless the context or the Notice of Funding Availability (NOFA) indicates otherwise. Other definitions may be found in Texas Government Code, Chapter 2306; Chapter 1 of this title (relating to Administration); and Chapter 20 of this title (relating to Single Family Programs Umbrella Rule).

(1) Applicable Median Family Income--The Department's determination, as permitted by Texas Government Code, §2306.123, of the median income of a family for an area using a source or methodology acceptable under §143(f) of the Code. Amounts of the Applicable Median Family Income, as updated from time to time, may be found on the Department's website (www.tdhca.state.tx.us) in the "Combined Income and Purchase Price Limits Table."

(2) Applicant--A person or persons applying for financing of a mortgage loan under the Program.

(3) Areas of Chronic Economic Distress--Those areas in the state, whether one or more, designated from time to time as areas of chronic economic distress by the state and approved by the U.S. Secretaries of Treasury and Housing and Urban Development, respectively, pursuant to §143(j) of the Code.

(4) Average Area Purchase Price--With respect to a Residence financed under the Program, the average purchase price of single-family residences in the statistical area in which the Residence is located which were purchased during the most recent twelve (12) month period for which statistical information is available, as determined in accordance with §143(e) of the Code.

(5) Code--The Internal Revenue Code of 1986, as amended from time to time.

(6) Contract for Deed Exception--The exception for certain mortgage loan eligibility requirements, as provided in the master mortgage origination agreement, available with respect to a principal residence owned under a contract for deed by a person whose family income is not more than 50 percent of the area's Applicable Median Family Income.

(7) First Time Homebuyer--A person who has not owned a home during the three (3) years preceding the date on which an application under this program is filed, except if the application is with respect to a home in a targeted area. A person will be considered to have owned a home if the person had a present ownership interest in a home during the three (3) years preceding the date on which the application was filed. In the event there is more than one person applying with respect to a home, each applicant must separately meet this three year requirement.

(8) Master mortgage origination agreement--The contract between the department and a mortgage lender, together with any amendments thereto, setting forth certain terms and conditions relating to the origination and sale of mortgage loans by the mortgage lender and the financing of such mortgage loans by the department.

(9) Program--The Texas First Time Homebuyer Program.

(10) Purchase Price Limit--The Purchase Price Limits published and updated from time to time in the "Combined Income and Purchase Price Limits Table" found on the Department's website equal to 90 percent of the Average Area Purchase Price, subject to certain exceptions for Targeted Area Loans.

(11) Qualified Veteran Exemption to First Time Homebuyer Requirement--A qualified veteran who has not previously received financing as a first time homebuyer through a single family mortgage revenue bond program is exempt from the requirement to be a first time homebuyer. The veteran must certify that he or she has not previously obtained a mortgage loan financed by single family mortgage revenue bonds and is utilizing the veteran exception set forth in §143(d)(2)(D) of the IRS Code. Qualified veterans must also complete a worksheet evidencing qualification as a veteran and provide copies of discharge papers.

(12) Residence--A dwelling in Texas in which an Applicant intends to reside as the Applicant's principal dwelling space.

(13) Targeted Area--A qualified census tract, as determined in accordance with §6(a)103A-(2)(b)(4) of the Regulations or any successor regulations thereto, an Area of Chronic Economic Distress. Applicants purchasing in Targeted Areas may have higher income and purchase price limits as set forth in the "Combined Income and Purchase Price Limits Table" found on the Department's website.

(14) Targeted area exemption to first time homebuyer requirement--Borrower's purchasing homes in targeted areas financed through the program are exempt from the requirement to be a first time homebuyer and income and purchase price limits may be higher as found in the "Combined Income and Purchase Price Limits Table" located on the Department's website.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 28. TAXABLE MORTGAGE PROGRAM

10 TAC §§28.1 - 28.9

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 28, §§28.1 - 28.9, concerning Taxable Mortgage Program, without changes to the proposed text as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5948) and will not be republished.

REASONED JUSTIFICATION. The purpose of the new sections is to set forth policies and procedures governing the administration of the Department's Taxable Mortgage Program. Additionally, the Department finds that the new chapter aligns the Taxable Mortgage Program with new 10 TAC Chapter 20, concerning the Single Family Programs Umbrella Rule.

The Department accepted public comments between August 10, 2012, and September 10, 2012. Comments regarding the new sections were accepted in writing and by fax. No comments were received concerning the new sections.

The Board approved the final order adopting the new sections on October 9, 2012.

STATUTORY AUTHORITY. The new sections are adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules. More specifically, Texas Government Code, §2306.141, authorizes the Department to adopt rules governing the administration of its housing programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 29. TEXAS SINGLE FAMILY NEIGHBORHOOD STABILIZATION PROGRAM RULE

10 TAC §§29.1 - 29.5

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 29, §§29.1 - 29.5, concerning Texas Single Family Neighborhood Stabilization Program Rule, without changes to the proposed text as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5950) and will not be republished.

REASONED JUSTIFICATION. The purpose of the new chapter is to set forth policies and procedures governing the administration of the Department's Texas Single Family Neighborhood Stabilization Program. Recently the Department reorganized and

restructured all of its housing and community affairs programs. Part of the purpose of the reorganization was to separate single and multi-family program delivery and to standardize much of the single family housing program procedures. These changes were implemented for the purpose of improving the delivery of housing solutions to Texans. The new sections will help accomplish those goals by better aligning the new Texas Single Family Neighborhood Stabilization Program Rule with new 10 TAC Chapter 20, concerning Single Family Programs Umbrella Rule.

The Department accepted public comments between August 10, 2012, and September 10, 2012. Comments regarding the new sections were accepted in writing and by fax. No comments were received concerning the new sections.

The Board approved the final order adopting the new sections on October 9, 2012.

STATUTORY AUTHORITY. The new sections are adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 12, 2012.

TRD-201205343
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: November 1, 2012
Proposal publication date: August 10, 2012
For further information, please call: (512) 475-3916

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CHAPTER 51. HOUSING TRUST FUND RULE

10 TAC §§51.1 - 51.11

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 51, §§51.1 - 51.11, concerning the Housing Trust Fund Rule without changes to the proposal as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5859) and will not be republished.

REASONED JUSTIFICATION. This repeal is necessary to allow for the adoption of new 10 TAC Chapter 26, Texas Housing Trust Fund Rule.

The Department accepted public comments between August 10, 2012 and September 10, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning this repeal.

The Board approved the final order adopting the repeal on October 9, 2012.

STATUTORY AUTHORITY. The repeal is adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules. Additionally, the repeal is proposed pursuant to Texas Government Code, §2306.141, which specifically authorizes the Department to promulgate rules to administer its housing programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Timothy K. Irvine
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For further information, please call: (512) 475-3916

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CHAPTER 53. HOME PROGRAM RULE
SUBCHAPTER C. HOMEOWNER REHABILITATION ASSISTANCE (HRA) PROGRAM ACTIVITY

10 TAC §§53.30 - 53.32

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 53, Subchapter C, §§53.30 - 53.32, concerning Homeowner Rehabilitation Assistance (HRA) Program Activity, without changes to the proposal as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5952) and will not be republished.

REASONED JUSTIFICATION. The Department recently underwent a reorganization which separated the HOME Division into single family and multifamily areas. The 2010 HOME rule at 10 TAC Chapter 53 did not allow for the single family and multifamily areas to effectively administer their activities with autonomy. Additionally, the Single Family HOME rules required updates which aligned more closely with the other Single Family programs, and the new 10 TAC Chapter 20 specifically. Therefore, a repeal of the portions of the HOME Rule at 10 TAC Chapter 53 and an adopted new Single Family HOME Rule at 10 TAC Chapter 23 were necessary.

The Department accepted public comments between August 10, 2012, and September 10, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning the repeal.

The Board approved the final order adopting the repeal on October 9, 2012.

STATUTORY AUTHORITY. The repeal is adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 11, 2012.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER D. HOMEBUYER ASSISTANCE (HBA) PROGRAM ACTIVITY

10 TAC §§53.40 - 53.42

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 53, Subchapter D, §§53.40 - 53.42, concerning Homebuyer Assistance (HBA) Program Activity, without changes to the proposal as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5952) and will not be republished.

REASONED JUSTIFICATION. The Department recently underwent a reorganization which separated the HOME Division into single family and multifamily areas. The 2010 HOME rule at 10 TAC Chapter 53 did not allow for the single family and multifamily areas to effectively administer their activities with autonomy. Additionally, the Single Family HOME rules required updates which aligned more closely with the other Single Family programs, and the new 10 TAC Chapter 20 specifically. Therefore, a repeal of the portions of the HOME Rule at 10 TAC Chapter 53 and an adopted new Single Family HOME Rule at 10 TAC Chapter 23 were necessary.

The Department accepted public comments between August 10, 2012, and September 10, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning the repeal.

The Board approved the final order adopting the repeal on October 9, 2012.

STATUTORY AUTHORITY. The repeal is adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER E. CONTRACT FOR DEED CONVERSION (CFDC) PROGRAM ACTIVITY

10 TAC §§53.50 - 53.52

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 53, Subchapter E, §§53.50 - 53.52, concerning Contract for Deed Conversion (CFDC) Program Activity, without changes to the proposal as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5953) and will not be republished.

REASONED JUSTIFICATION. The Department recently underwent a reorganization which separated the HOME Division into single family and multifamily areas. The 2010 HOME rule at 10 TAC Chapter 53 did not allow for the single family and multifamily areas to effectively administer their activities with autonomy. Additionally, the Single Family HOME rules required updates which aligned more closely with the other Single Family programs, and the new 10 TAC Chapter 20 specifically. Therefore, a repeal of the portions of the HOME Rule at 10 TAC Chapter 53 and an adopted new Single Family HOME Rule at 10 TAC Chapter 23 were necessary.

The Department accepted public comments between August 10, 2012, and September 10, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning the repeal.

The Board approved the final order adopting the repeal on October 9, 2012.

STATUTORY AUTHORITY. The repeal is adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 11, 2012.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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Proposal publication date: August 10, 2012
For further information, please call: (512) 475-3916

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SUBCHAPTER F. TENANT-BASED RENTAL ASSISTANCE (TBRA) PROGRAM ACTIVITY

10 TAC §§53.60 - 53.62

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 53, Subchapter F, §§53.60 - 53.62, concerning Tenant-Based Rental Assistance (TBRA) Program Activity, without changes to the proposal as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5953) and will not be republished.

REASONED JUSTIFICATION. The Department recently underwent a reorganization which separated the HOME Division into single family and multifamily areas. The 2010 HOME rule at 10 TAC Chapter 53 did not allow for the single family and multifamily areas to effectively administer their activities with autonomy. Additionally, the Single Family HOME rules required updates which aligned more closely with the other Single Family programs, and the new 10 TAC Chapter 20 specifically. Therefore, a repeal of

the portions of the HOME Rule at 10 TAC Chapter 53 and an adopted new Single Family HOME Rule at 10 TAC Chapter 23 were necessary.

The Department accepted public comments between August 10, 2012, and September 10, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning the repeal.

The Board approved the final order adopting the repeal on October 9, 2012.

STATUTORY AUTHORITY. The repeal is adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 11, 2012.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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Proposal publication date: August 10, 2012
For further information, please call: (512) 475-3916

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SUBCHAPTER G. SINGLE FAMILY DEVELOPMENT (SFD) PROGRAM ACTIVITY

10 TAC §§53.70 - 53.72

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 53, Subchapter G, §§53.70 - 53.72, concerning Single Family Development Program Activity, without changes to the proposal as published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5954) and will not be republished.

REASONED JUSTIFICATION. The Department recently underwent a reorganization which separated the HOME Division into single family and multifamily areas. The 2010 HOME rule at 10 TAC Chapter 53 did not allow for the single family and multifamily areas to effectively administer their activities with autonomy. Additionally, the Single Family HOME rules required updates which aligned more closely with the other Single Family programs, and the new 10 TAC Chapter 20 specifically. Therefore, a repeal of the portions of the HOME Rule at 10 TAC Chapter 53 and an adopted new Single Family HOME Rule at 10 TAC Chapter 23 were necessary.

The Department accepted public comments between August 10, 2012 and September 10, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning the repeal.

The Board approved the final order adopting the repeal on October 9, 2012.

STATUTORY AUTHORITY. The repeal is adopted pursuant to the authority of Texas Government Code, §2306.053 which authorizes the Department to adopt rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 11, 2012.

TRD-201205313
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: October 31, 2012
Proposal publication date: August 10, 2012
For further information, please call: (512) 475-3916

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CHAPTER 80. MANUFACTURED HOUSING

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (the "Department") adopts amendments to 10 TAC Chapter 80, §80.21, 80.25, and 80.41, relating to the regulation of the manufactured housing program. The amendments to §80.21 are adopted without changes to the proposed text as published in the August 17, 2012, issue of the *Texas Register* (37 TexReg 6233). Non-substantive changes were made in §80.25 to correct the reference location of a drawing from subsection (k)(2) to (k)(3) and in §80.41 to correct a typo in the proposed new language. The rules with non-substantive changes will be republished in the *Texas Register.*

The amendments are adopted to provide clarification of procedures.

The rules relating to installation standards (§80.21 and §80.25) are effective sixty (60) days following the date of publication and all other rules are effective thirty (30) days following the date of publication with the *Texas Register* of notice that the rules are adopted.

There were no comments received during the comment period and no requests were received for a public hearing to take comments on the rules.

Except as noted below, the rules as proposed on August 17, 2012, are adopted as final rules with the following non-substantive changes.

The following is a restatement of the rules' factual basis:

Section 80.21(j) is adopted (without changes) to add the electrical testing requirement that was previously in §80.25 because the requirement is only for new manufactured homes.

Section 80.25(j)(5) is adopted (without changes) to remove the electrical testing requirement from the generic standards because the requirement is only for new manufactured homes.

Figure: 10 TAC §80.25(j)(5) is adopted (without changes) to move it from §80.25(j)(6). There is no change to the drawing and table.

Section 80.25(j)(6) is adopted (without changes) to re-number the paragraph to (5).

Figure: 10 TAC §80.25(k)(2) is adopted (with changes) to move drawing to §80.25(k)(3). There is no change to the drawing and table.

Figure: 10 TAC §80.25(k)(3) is adopted (with changes) to move drawing from §80.25(k)(2). There is no change to the drawing and table.

Section 80.41(d) is adopted (with changes) to clarify the curriculum for the continuing education program. In §80.41(d)(4) the proposed wording "conditional courses" was corrected to "continuing education courses."

SUBCHAPTER B. INSTALLATION STANDARDS AND DEVICE APPROVALS

10 TAC §80.21, §80.25

The amended rules are adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by adoption of the amended rules.

§80.25. Generic Standards for Multi-Section Connections Standards.

(a) Air infiltration and water vapor migration at mating surfaces: Before positioning additional sections, the mating line surfaces along the floor, endwall and ceiling, require material or procedures to limit air infiltration and water vapor migration.

(1) Expanding Foam: Foam may be used along surfaces that are accessible after the units have been joined. Where mating line walls line up between sections, non-porous materials must be installed prior to joining the units.

(2) Caulking: Caulking may be used along surfaces that are accessible after the units have been joined. Where mating line walls line up between sections, non-porous materials must be installed prior to joining the units.

(3) Non-porous gasket installed along the perimeter of all mating lines.

(4) Insulation, carpet, carpet pad or other porous materials are not acceptable.
Figure: 10 TAC §80.25(a)(4) (No change.)

(b) Floor Connections:

(1) Gaps between floors up to 1-1/2 inches maximum which do not extend the full length of the floor may be filled with lumber, plywood or other suitable shimming materials. Fastener lengths in shimmed areas may need to be increased to provide minimum 1-1/4 inches penetration into opposite floor rim joist.

(2) Gaps less than 1/2 inch width need not be shimmed.

(3) The floor assemblies of multi-section units must be fastened together. Fastener options and maximum spacings are listed in the floor connections figure in paragraph (4) of this subsection.

(4) Any tears or damages to the bottom board due to fastener installation must be repaired.
Figure: 10 TAC §80.25(b)(4) (No change.)

(c) Endwall Connections:

(1) Endwalls must be fastened together at the mating line with minimum #8x4 inch wood screws or 16d nails at maximum 8 inches on-center or 12 inches on-center maximum for 5/16 lags; toed or driven straight; and

(2) Fastener length may need to be adjusted for gaps and/or toeing, to provide minimum 1-1/2 inch penetration into opposite endwall stud.
Figure: 10 TAC §80.25(c)(2) (No change.)

(d) Roof Connection: (Note: Fasteners must not be used to pull the sections together.)

(1) Roof shall be connected with the fasteners and spacings specified in the figure in paragraph (2) of this subsection.

(2) Gaps between the roof sections (at ridge beam and/or open beam ledgers) of up to 1-1/2 inches wide maximum which do not extend the full length of the roof must be filled with lumber and/or plywood shims. Gaps up to 1/2 inch need not be shimmed. The fastener length used in the shimmed area may need to be increased to provide a minimum 1-1/4 inch penetration into the adjacent roof structural member.
Figure: 10 TAC §80.25(d)(2) (No change.)

(e) Exterior Roof Close Up:

(1) Ensure that shingles are installed to edge of roof decking at peak. Follow nailing instructions on the shingle wrapper. Note: Wind Zone II (high wind) installations require additional fasteners.

(2) Before installing ridge cap shingles, a minimum 6 inch wide piece of 30 gauge galvanized flashing must be installed the length of the roof.

(3) When flashing is not continuous, lap individual pieces a minimum of 6 inches.

(4) Fasten flashing into roof sheathing with minimum 16 gauge staples with 1 inch crown or roofing nails of sufficient length to penetrate roof decking. Maximum fastener spacing is 6 inches on-center each roof section. Place fasteners a minimum of 3/4 inches along edge of flashing.

(5) Install ridge shingles directly on top of flashing.

(6) Check and repair as necessary the remainder of roof for any damaged or loose shingles, remove any shipping plastic or netting, wind deflectors, etc. Make sure to seal any fastener holes with roofing cement.
Figure: 10 TAC §80.25(e)(6) (No change.)

(f) Exterior Endwall Close Up: Cut closure material to the shape and size required and secure in place, starting from the bottom up, i.e.: bottom starter, vertical or horizontal siding, then roof overhang, soffit and fascia. All closure material should be fitted and sealed as required to protect the structure or interior from the elements.

(g) HVAC (heat/cooling) Duct Crossover:

(1) Crossover duct must be listed for EXTERIOR use.

(2) Duct R-value shall be a minimum of R-4.

(3) The duct must be supported 48 inches on-center (maximum) and must not be allowed to touch the ground. Either strapping (minimum 1 inch wide), to hang the duct from the floor, or non-continuous pads to support it off the ground are acceptable.

(4) The duct to the collar or plenum connections must be secured with bands or straps designed for such use. Keep duct as straight as possible to avoid kinks or bends that may restrict the airflow. Extra length must be cut off.

(5) The installer should refer to the manufacturer's instruction for assembling the overhead duct.
Figure: 10 TAC §80.25(g)(5) (No change.)

(h) Multi-Section Water Crossover:

(1) If there is water service to other sections, connect the water supply crossover lines as shown in the applicable detail.

(2) If the water crossover connection is not within the insulated floor envelopes, wrap the exposed water lines in insulation and secure with a good pressure sensitive tape or nonabrasive strap, or enclose the exposed portion with an insulated box.

(3) If water piping at the inlet is exposed, a heat tape should be installed to prevent freezing. A heat tape receptacle has been provided near the water inlet. When purchasing a heat tape, it must be listed for manufactured home use, and it must be installed per manufacturer's instructions.
Figure: 10 TAC §80.25(h)(3) (No change.)

(i) Drain, Waste and Vent System (DWV):

(1) Portions of the DWV system which are below the floor may not have been installed, to prevent damage to the piping during transport. Typically, the DWV layout is designed to terminate at a single connection point to connect to the on-site sewer system. For a used home where on-site DWV connections are not assembled per the manufacturer's instructions, the DWV system must be assembled in accordance with Part 3280 of the FMHCSS.
Figure: 10 TAC §80.25(i)(1) (No change.)

(2) The following guidelines apply:

(A) All portions of the DWV system shall be installed to provide a minimum of 1/8 inch slope per foot for a 3 inch diameter pipe or larger, in the direction of the flow. For all other pipe, a minimum of 1/4 inch is required.

(B) Changes in direction from vertical to horizontal, and horizontal to horizontal, shall be made using long sweep elbows and/or tees.

(C) All drain piping shall be supported at intervals not to exceed 4 feet on-center. The support may be either blocking or strapping. When strapping is used, it should be nonabrasive.

(D) Piping must be assembled with the appropriate cleaners, primers and solvents (note: both ABS and PVC systems are common, but will require adhesives). Be sure to follow the instructions of the product used.

(E) A cleanout must be installed at the upper (most remote) end of the floor piping system.

(3) Water testing: At the time of installation the water system must be inspected and tested for leaks after completion at the site (the water heater must be disconnected when using an air-only test).

(4) Drainage system testing: At the time of installation the drainage system must be inspected and tested for leaks after completion at the site.

(j) Electrical Connections: Depending on the model and/or manufacturer of the home, electrical crossovers may be located in either the front end and/or rear end of the home. Check along mating line for other labeled access panels.

(1) Crossover connections may be one of the following:

(A) snap or plug-in type;

(B) junction boxes inside floor cavity (note: crossover wiring routed outside the floor cavity must be enclosed in conduit). If the boxes and/or covers are metal, they must be grounded by the use of the ground wire; or

(C) pigtail between receptacles/switches between sections (one circuit only and enclosed in a j-box according to the National Electrical Code (NEC).

(2) Chassis Bonding: Each chassis shall be bonded to the adjacent chassis with a solid or stranded, green insulated or bare, number 8 copper conductor. The conductor is connected to the steel chassis with a solderless lug. Alternate bonding: A 4 inch wide by 30 gauge continuous metal strap may be used as an alternate, when attached to the chassis members with two #8x3/4 inch self tapping metal screws each end of the strap.
Figure: 10 TAC §80.25(j)(2) (No change.)

(3) Electrical Crossover.
Figure: 10 TAC §80.25(j)(3) (No change.)

(4) Shipped loose equipment:

(A) Electrical equipment such as ceiling fans, chandeliers, exterior lights, etc., which may have been shipped loose, must be installed in accordance with the adopted (NEC). Connect all corresponding color coded or otherwise marked conductors per the applicable sections of the NEC.

(B) Bonding strap removal: 240 volt appliances (range, dryer, etc.) shall have the bonding strap removed between the ground and the neutral conductors. Cords used to connect those appliances shall be four conductor, four prong.

(5) Main panel box feeder connection: The main panel box is wired with the grounding system separated from the neutral system (4-wire feeder). The grounding bus in the panel must be connected through a properly sized green colored insulated conductor to the service entrance equipment (meter base) located on or adjacent to the home. A licensed electrician is required to run the feeder from the pole to the main panel box in the home.
Figure: 10 TAC §80.25(j)(5)

(k) Fuel Gas Piping Systems:

(1) Crossover Connections: All underfloor fuel gas pipe crossover connections shall be accessible and be made with the connectors supplied by the home manufacturer, or, if not available, with flexible connectors listed for exterior use and a listed quick disconnect (Method A), or a shut-off valve (Method B). When shut-off valve is used, it must be installed on the supply side of the gas piping system. The crossover connector must have a capacity rating (BTUH) of at least the total BTUHs of all appliances it serves.

(2) Testing: The fuel gas piping system shall be subjected to an air pressure test of no less than 6 ounces and no more than 8 ounces. While the gas piping system is pressurized with air, the appliance and crossover connections shall be tested for leakage with soapy water or bubble solution. This test is required of the person connecting the gas supply to the home, but may also be performed by the gas utility or supply company.

(3) The gas system must be inspected and tested for leaks after completion at the site.
Figure: 10 TAC §80.25(k)(3)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 12, 2012.

TRD-201205333
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: December 25, 2012
Proposal publication date: August 17, 2012
For further information, please call: (512) 475-2206

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SUBCHAPTER D. LICENSING

10 TAC §80.41

The amended rule is adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by adoption of the rule.

§80.41. License Requirements.

(a) General License Requirements. In order to apply to obtain a license, the promulgated form of application for such license must be fully completed and executed and submitted to the Department, accompanied by the required fee, required security, and all other required supporting documentation. The Department may request any reasonably related additional information or documentation to clarify or support any application.

(1) Additional provisions applicable to salespersons.

(A) A salesperson is an agent of their sponsoring retailer or broker. The sponsoring retailer or broker is liable and responsible for the acts or omissions of a salesperson in connection with any activity subject to the Standards Act or this Chapter. It is a violation of the Standards Act and this chapter for a retailer or broker of manufactured housing to employ a salesperson who is not licensed with the Department or permit them to conduct business subject to the Standards Act on their behalf.

(B) If a salesperson's sponsoring retailer or broker is no longer licensed, that salesperson's ability to act and a salesperson is automatically terminated until such time as he or she is acting under a duly licensed sponsoring retailer or broker and such sponsorship is on record with the Department. A salesperson shall surrender his or her license to the Department within ten (10) calendar days of termination from his or her sponsoring retailer.

(C) A sponsoring retailer or broker shall notify the Department in writing when a salesperson has been terminated or is no longer sponsored by said retailer or broker.

(D) A salesperson's sponsoring retailer or broker shall be issued a license card by the Department containing effective date and license number and name and license number of the sponsor. A salesperson shall be required to present a copy of a valid license card upon request.

(2) Additional provisions applicable to installers.

(A) A provisional installer's license shall become a full installer's license as outlined in §1201.104(f) of the Standards Act when the Department inspects a minimum of five (5) manufactured home installations and found not to have any identified installation violations.

(B) It is the responsibility of an installer who is still on a provisional status to notify the Department of each installation performed promptly. As used in this section, "promptly" means sufficiently early to enable the home to be inspected prior to any skirting being installed, in any event within three business days following the date of completion of the installation.

(C) It is the responsibility of the Department's field office to notify the Department's licensing section when a provisional installer's license is eligible for upgrade to a full installer's license.

(b) Applicable License Holder Ownership Changes.

(1) A license holder shall not change the location of a licensed business unless the license holder first files with the Department:

(A) a written notification of the address of the new location;

(B) an endorsement to the bond reflecting the change of location; and

(C) the original license.

(2) The change of location is not effective until all requirements are received by the Department.

(3) For a change in ownership of less than fifty percent (50%) of the licensed business entity, no new license is required provided that the existing bond or other security continues in effect. However, the current Articles of Incorporation or Assumed Name Certificate must accompany the request.

(4) For a change in ownership of fifty percent (50%) or more, the license holder must file with the Department, along with the appropriate fee and Articles of Incorporation or Assumed Name Certificate:

(A) a license addendum by the purchaser providing information as may be required by the Department; and

(B) certification by the surety that the bond for the licensed business entity continues in effect after the change in ownership; or

(C) an application for a new license along with a new bond or other security and proof that the education requirements of §1201.113 of the Standards Act, have been met.

(c) Education.

(1) The Standards Act requirement for an initial eight (8) hour course of instruction in the law, including instruction in consumer protection regulations; four (4) hour retailer education course; and/or four (4) hour installer education course shall be offered quarterly by the Department. Subject to limitations on Department resources, the Department will make special licensing classes available upon written request.

(2) Each test to be administered in connection with the course(s) will consist of a representative selection of questions from an approved set of questions approved by the Director. The test(s) will be open-book. A score of 70% correct is required to pass each test.

(3) For initial licensing of a salesperson, if the salesperson does not attend and successfully complete the initial licensing class provided by the Department within 90 days after the date of licensure,

the license will automatically be suspended until the salesperson has attended and successfully completed that class. While the license is in a suspended status the salesperson may not act as a manufactured housing salesperson.

(d) Continuing Education.

(1) Continuing education program courses must total eight (8) hours and shall include:

(A) A minimum of two (2) hours of continuing education addressing the law and rules with a focus on any revisions to the Code or Rules within the preceding two years.

(B) A minimum of one (1) hour of continuing education addressing the Department's current complaint resolution process.

(C) The following additional topics may be covered to satisfy the remaining credit hours needed not addressed in subparagraph (A) or (B) of this paragraph.

(i) installation requirements;

(ii) manufactured home financing;

(iii) operation of manufactured home parks and communities;

(iv) insurance requirements;

(v) industry best practices;

(vi) business ethics;

(vii) topical market statistics or trends; or

(viii) other subjects determined by the Department to relate directly to the lawful operation of a business subject to the Code.

(2) Acceptable evidence that the requirements of §1201.113(b) of the Standards Act have been satisfied by the license holder or their related person on record with the Department, would be a certificate, letter, or similar statement provided by the approved education provider indicating that the education program was timely completed. Such evidence may be submitted by fax, mail, e-mail, or in person.

(3) For license renewal, evidence of any required completion, with reference to license number, must be received by the Department before a license may be renewed.

(4) Approval of courses and providers. In order to be considered for approval by the Board to provide continuing education courses, including prospective continuing education courses in accordance with paragraph (5) of this subsection, a party wishing to be considered for such approval must submit an application, accompanied by the nonrefundable processing fee, and the following:

(A) A narrative overview of each course, describing subject matter to be covered;

(B) Brief biographies, including credentials of each instructor demonstrating in depth knowledge of the subject matter to be taught;

(C) A copy of any course materials to be used. If the course materials are deemed to be proprietary they should be placed in a separate envelope, marked confidential, and accompanied by a written statement as to why they should not be treated as open records. There is no assurance that such materials will ultimately be accorded any exemption from disclosure under the Open Records provisions of the Government Code;

(D) A schedule of any fees to be charged for each course;

(E) If completion of the continuing education program is limited to any particular group, a description of the limitation;

(F) As such information becomes available, an indication as to the locations, times, and dates for offerings; and

(G) Such other information as the Department may require.

(5) Prospective continuing education programs, including all portions of education courses, must be pre-approved by the board prior to the course being held or broadcast.

(6) Once the Department determines that a request for approval is complete, that request will be placed on the next regularly scheduled meeting of the Board for consideration. The Department will provide the board with a written recommendation on each such request. The staff will advise the applicant of the board's action within ten (10) business days of the date of the board meeting, including a written statement as to any limitations, conditions, or other requirements imposed.

(A) Approvals shall be for a period not to exceed two years. The Department may, at no cost, attend or send a representative to attend any approved portion of the continuing education program to determine that the courses are being taught in accordance with the terms of approval.

(B) The Department may revoke or suspend approval of a continuing education program if the Department determines that any of the courses are not being taught in accordance with the terms of approval or that any of the courses are not being administered in accordance with the law or these rules. Any action to revoke or suspend such an approval is a contested matter under Chapter 2001, Government Code, and the party against whom revocation or suspension is sought may make a written request for a hearing before an Administrative Law Judge. If no such hearing is requested within thirty (30) calendar days after receipt of notice from the Department, the Department order of suspension or revocation shall become final.

(e) License Application and Renewal.

(1) Initial Application Processing.

(A) It is the policy of the Department to issue the license within seven (7) business days after receipt of all required information and the following conditions have been met:

(i) all required forms are properly executed; and

(ii) all requirements of applicable statutes and this Chapter have been met.

(B) License applications and accompanying documents found to be incomplete or not properly executed shall be returned to the applicant with an explanation of the specific reason and what information is required to complete license.

(C) Upon request, the Department will disclose the license number assigned and the effective date for a license that has been approved but not yet delivered to the license holder.

(2) License Renewal Requirements. It is the responsibility of a license holder to renew the license prior to its expiration date.

(A) In order to prevent the expiration and lapse of a license, a complete application for license renewal must be received by the Department prior to the date on which the current license expires.

(B) If an application for license renewal is received by the Department after the date on which the current license expires, the license will not be issued without the required late fees identified in §1201.116(d) and (e) of the Standards Act.

(3) Payment of license fees.

(A) All required fees must be paid in order to obtain a valid license, including a renewal license, from the Department.

(B) Any license issued by the Department is void and of no effect if based upon a check or other form of payment that is later returned for insufficient funds, closed account, or other reason, regardless of whether the Department notifies the applicant of the insufficiency of payment or the invalidity of the license.

(C) It is the applicant's responsibility to ensure that all licensing fees are paid in valid U.S. funds.

(f) License Application or Renewal Denial.

(1) In the evaluation of an applicant for a license other than a salesperson's license, the Director shall consider whether the applicant or any related person involved with the applicant has previously:

(A) been found in a final order to have participated in one or more violations of the Standards Act that served as grounds for the suspension or revocation of a license;

(B) been found to have engaged in activity subject to the Standards Act without possessing the required license;

(C) caused the trust fund to incur unreimbursed payments or claims;

(D) failed to abide by the terms of a final order or agreed final order, including the payment of any assessed administrative penalties; or

(E) had any state license revoked for violations of a law or rule.

(2) If any of the preceding factors is present with respect to the applicant or any related person involved with the applicant, the director will further determine:

(A) whether all appropriate corrective action has been taken;

(B) whether the applicant has adopted policies and procedures or taken other appropriate measures to prevent recurrences; and

(C) whether additional conditions or limitations on the license would be appropriate.

(3) In determining whether an applicant should be issued a license if that applicant states in his/her application for said license that he/she has a criminal record, which may include a conviction, deferred adjudication, plead guilty, or nolo contendere for any felony or misdemeanor offense, other than a Class C Misdemeanor for traffic violations, within five (5) years preceding the date of the application, the Director shall consider the factors set out in Texas Occupations Code, §53.022:

(A) the nature and seriousness of the crime;

(B) the relationship of the crime to the intended manufactured housing business activity;

(C) the extent to which a license holder might engage in further criminal activity of the same or similar type as that in which the applicant previously had been involved;

(D) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the functions and responsibilities of the license holder's occupation or industry; and

(E) whether the offenses were defined as crimes of moral turpitude by statute or common law, from Class A misdemeanors to first, second, and third degree felonies carrying fines and/or imprisonment or both. Special emphasis shall be given to the crimes of robbery, burglary, theft, embezzlement, sexual assault, and conversion.

(4) In addition to the factors that may be considered in paragraph (3) of this subsection, the Department, in determining the present fitness of a person who has a criminal record, may consider the following:

(A) the extended nature of the person's past criminal activity;

(B) the age of the person at the time of the commission of the crime;

(C) the amount of time that has elapsed since the person's last criminal record;

(D) the conduct and work activity of the person prior to and following the criminal record; and

(E) evidence of the person's rehabilitation or attempted rehabilitation effort while incarcerated or following release.

(5) The applicant shall furnish proof in any form, as may be required by the Department, that he/she has maintained a record of steady employment and has otherwise maintained a record of good conduct and has paid all outstanding court costs, supervision fees, fines, and restitution as may have been ordered in all criminal cases.

(6) If the Department suspends or revokes a valid license, or denies a person a license or the opportunity to be considered for a license in accordance with this subsection because of the person's prior criminal record and the relationship of the crime to the license, the Department shall:

(A) notify the person in writing stating reasons for the suspension, revocation, denial, or disqualification; and

(B) offer the person the opportunity for a hearing on the record. If the person does not request a hearing on the matter within thirty (30) calendar days from receipt of the Department's decision, the suspension, revocation, or denial becomes final.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 12, 2012.

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Joe A. Garcia
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Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-2206

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER H. ELECTRICAL PLANNING

DIVISION 2. ENERGY EFFICIENCY AND CUSTOMER-OWNED RESOURCES

16 TAC §25.181

The Public Utility Commission of Texas (commission) adopts amendments to §25.181, relating to Energy Efficiency Goal, with changes to the proposed text as published in the April 27, 2012, issue of the *Texas Register* (37 TexReg 2936).

The purpose of these amendments is to incorporate the changes from the 82nd Legislative Session, resulting from the passage of Senate Bills (SB) 1125, 1150, 1434, and 1910. The addition of an evaluation, measurement, and verification (EM&V) framework as directed by SB 1125 will result in the commission hiring an outside consultant(s) to develop a process that ensures accurate estimation of energy and demand impacts and will provide feedback to the commission, utilities, and stakeholders on program performance. The amendments also make several revisions to the energy efficiency cost recovery factor (EECRF) proceedings, including revising the procedural schedule and scope of the EECRFs and allowing an annual consumer price index (CPI) adjustment to the cost caps beginning in 2014; requiring costs to be directly assigned on a rate class basis and calculating EECRFs to provide for energy charges for residential and commercial customers billed for base rates on an energy basis and as an energy or demand charge for each commercial rate class billed on a demand basis for base rates; and replacing the three-year reconciliation proceeding with an expanded annual EECRF proceeding that includes the issue of the extent to which the costs recovered through the EECRF complied with PURA §39.905 and this section, and the extent to which the costs recovered were reasonable and necessary to reduce demand and energy growth, except for the 2013 proceedings that will allow a review of expenses for program years prior to 2012.

Other amendments include updating the avoided cost calculations to account for the transition to a nodal market design in the Electric Reliability Council of Texas (ERCOT); increasing the demand reduction goals to 30% of annual growth in demand beginning in 2013 and moving to four-tenths of summer-weather adjusted peak in subsequent years; setting the bonus at a maximum of 10% of total net benefits; adding provisions for utility self-delivered programs; revising load management programs by requiring more coordination with ERCOT; increasing the set-aside for targeted low-income programs to 10% of the utility's budget; formalizing the energy efficiency implementation project (EEIP) process; revising the customer protection standards and applicable definitions to allow behavioral programs; and adding an opt-out provision for industrial customers taking service at distribution voltage. The amendments constitute a competition rule subject to judicial review as specified in Public Utility Regulatory Act (PURA) §39.001(e). Project Number 39674 is assigned to this proceeding.

The commission received comments on the proposed amendments from Beneficial Results, LLC, CenterPoint Energy Houston Electric, LLC (CenterPoint), the City of El Paso, CLEAResult Consulting, Comverge, Earth Networks, Inc., EnergyConnect, Inc. (ECI), EnerNOC, Inc., Environmental Defense Fund, Inc. (EDF), the Cities of Anahuac, Beaumont, Bridge City, Cleveland, Conroe, Dayton, Groves, Houston, Huntsville, Montgomery, Navasota, Nederland, Oak Ridge North, Orange, Pine Forest, Rose City, Pinehurst, Port Arthur, Port Neches, Shenandoah, Silsbee, Sour Lake, Splendora, Vidor, and West Orange (collectively Entergy Cities), the Electric Reliability Council of Texas (ERCOT), Oncor Electric Delivery Company, LLC (Oncor), CenterPoint, AEP Texas North Company (AEP TNC), AEP Texas Central Company (TCC), Southwestern Electric Power Company (SWEPCO), Entergy Texas, Inc. (ETI), Xcel/Southwestern Public Service Company (SPS), El Paso Electric Company (EPE), Texas-New Mexico Power Company (TNMP), and Sharyland Utilities, L.P. (Sharyland) (collectively Joint Utilities), North American Power Partners (NAPP), Opower, Inc., Office of Public Utility Counsel (OPUC), Pepco Energy Services (Pepco), Public Citizen and Sustainable Energy and Economic Development Coalition (Public Citizen and SEED Coalition), the Responsible Energy Codes Alliance (RECA), the Retail Electric Provider Coalition (REP Coalition), Sierra Club, Lone Star Chapter, SPS, Steering Committee of Cities Served by Oncor (Cities), TAS Energy (TAS) and Natgun, Texas Association of Community Action Agencies, Inc. (TACAA), Texas Citizens in Response to a Sierra Club Action Alert, which included the names of 1,526 citizens (Texas Citizens), Texas Combined Heat and Power Initiative (TX CHPI), Texas Industrial Electric Consumers (TIEC), Texas Ratepayers' Organization to Save Energy (TX ROSE) and Texas Legal Services Center (TLSC), Texas Renewable Energy Industries Association (TREIA), TNMP, and Wal-Mart Stores Texas, LLC and Sam's East, Inc. (Walmart).

The REP Coalition was composed of the Alliance for Retail Markets (ARM); CPL Retail Energy, LP; Reliant Energy Retail Services, LLC; WTU Retail Energy, LP; TXU Energy Retail Company LLC; the Alliance for Retail Markets (ARM); and Texas Energy Association for Marketers (TEAM). The participating members of ARM with respect to the REP Coalition comments were: Champion Energy Services, LLC; Direct Energy, LP; Gexa Energy, LP; and Green Mountain Energy Company. The participating members of TEAM with respect to the REP Coalition comments were: Accent Energy; Amigo Energy; Bounce Energy; Cirro Energy; Energy Plus Holdings; Green Mountain Energy Company; Just Energy; Hudson Energy Services; StarTex Power; Stream Energy; Tara Energy; Texas Power; and TriEagle Energy. In addition to comments on the proposed amendments, the commission also received comments in response to the following preamble questions:

(1) Should the commission require utilities to transition their load management programs to ERCOT once loads are able to participate in the ERCOT energy market? What changes would need to occur to phase-out existing programs and over what time period?

(2) Should the commission develop performance standards for the loads that are similar to the Emergency Response Services (ERS) standards outlined in §25.507? Should the utilities offer incentives to loads for equipment that would enable their participation in the ERCOT market? If so, should the utilities be allowed to count the demand and energy savings associated with the installed equipment toward meeting their goals? How should these savings be calculated?

Preamble question one:

OPUC, Public Citizen, SEED Coalition, REP Coalition, TX ROSE, and TLSC generally supported the transition of the utilities' load management programs to ERCOT. OPUC commented that its overarching interest is that the utility programs be used to achieve the greatest benefit to the grid, and that program costs are market-based, competitive, and allocated in a way that reflects the benefits of the programs. It stated that ERCOT is in the best position to utilize the programs with the most benefit to the grid, and responsive reserve program costs are more appropriately allocated than the energy efficiency program costs. It stated that it believed ERCOT is in the best position to provide the most market-neutral, equitable and unbiased guidance to the commission on the load management issue.

TX ROSE and TLSC stated that the load management programs should be moved to ERCOT in their entirety and that any incentive for load management or demand response programs should be market-based and passed on to consumers by REPs. They commented that it is not necessary to support load management through the regulated utilities, and instead, the commission should steer the utilities towards making program investments that offer the highest long-term value to the customer. They commented further that load management does not result in energy savings or provide savings that will persist over time as they would with traditional energy efficiency investments. Load management is an appropriate measure for managing system reliability and as such should be supported by the market. They stated that energy efficiency measures have a higher value than load management since they operate on-peak and off-peak, making a lasting contribution to the system as well as producing long-term bill reductions for customers. Load management changes the timing of energy use rather than the amount.

REP Coalition commented that active participation of economically-dispatchable load in the ERCOT wholesale market will expand the role of load in the context of resource adequacy in both the short- and long-term. Load resources will be permitted to submit price offers at ERCOT to set the market-clearing price for energy in competition with generation resources, providing more accurate price signals during periods when available generation is scarce. The resulting prices will reflect customers' outage costs or the value of lost load. It stated that the utilities' programs do not send an affirmative price signal to the competitive market and the value of the load curtailed is not communicated within a dynamic framework of resources competing on the basis of price. Instead, the curtailment under the utility programs actually dampens or reverses pricing signals in the competitive energy market and ultimately disserves ERCOT's energy-only market. It also stated that economically-dispatchable load will facilitate more robust demand response in ERCOT, including allowing REPs to offer products and services featuring dynamic pricing. It stated that §25.243(c) limits a utility's provision of competitive energy services to the *administration* of energy efficiency programs and opposed any expansion of the utilities' role in load management when the competitive market is capable of providing services and products to meet customers' needs. It commented that the load management programs might have compromised the opportunity for REPs to offer similar products outside the utilities' energy efficiency portfolios, which are funded through regulated rates. It also commented that contrary to opposing parties' arguments, the proposed transition is not premature. It stated that such commission directive ensures the intent of PURA §39.905(b)(7), which allows all loads to participate in ERCOT's energy markets subject to certain qualitative prerequisites.

Public Citizen and SEED Coalition commented that many load management programs can be transitioned into the ERCOT market through the "Loads in SCED" project. They noted that some participants in the load management program may, for technical reasons, not be able to participate in the ERCOT market, and the utility load management programs should be maintained for those participants.

NAPP and TIEC commented on the need to separate any program with utility benefits from programs providing services in the competitive market. NAPP commented that the utility programs should be used to continue to develop as long as they are designed to serve a separate and unique purpose such as transmission and distribution cost deferral or local congestion relief. It maintained that utility programs that duplicate functions of ERCOT programs should be transitioned to ERCOT, as they demonstrate potential for adoption at the ISO. It stated that allowing demand response participation is a necessary component of the energy-only market and will allow more stable, predictable pricing patterns to emerge. It commented that an efficient market should provide a balance between generation and demand so that an appropriate market price is reached. Curtailed load would be added to the bid stack when it is actually curtailed.

TIEC stated it has long supported demand response in the competitive energy and ancillary services markets, but does not take a position at this time on the continuation of utility load management programs that are not market-based or price-driven. They stated that a load should not be able to participate in both a utility program and the competitive market at the same time, and that while the rule prohibits load participating in the utility program from offering ancillary services, the rule should also be applied to loads participating in the competitive energy market. They stated that any load participation in the ERCOT market must be entirely competitive and cost-based, and not subsidized by utility ratepayers. To transition a load currently in a utility program to the ERCOT energy market that load would need to be removed from the regulated utilities' programs. They proposed language in subsection (m)(6) clarifying their proposed amendments.

Cities, CLEAResult, Comverge, ECI, EnerNOC, Joint Utilities, and Sierra Club generally opposed requiring the utilities' load management programs to be transitioned to ERCOT. ECI stated that it does not support removing the programs from the utilities' portfolios without an overall strategic effort to enhance demand response in the ERCOT market. It noted that the utilities' programs and the ERCOT real-time energy market serve fundamentally different purposes and many customers may be unwilling or unable to participate in the ERCOT market. It believed that utility and ERCOT programs are complementary and should both be offered to provide different options for customers. It stated that it was unclear why the commission would even be considering sunsetting the utility programs since they are helping to ensure resource adequacy and have recently been increased by the commission to ensure sufficient resources are available. Cities and Sierra Club commented that the utility programs might actually facilitate participation in load management activities, as the programs appeal to less sophisticated, smaller-sized commercial customers without the expertise to participate in the ERCOT market. They stated that the continuation of the utility programs is reasonable as long as participating customers do not receive incentives from multiple sources for the same interruption events. Comverge noted that there are risks associated with

the assumption that the utility programs can smoothly transition into the ERCOT market, as it is not clear if market protocols or pricing arrangements would be sufficiently attractive for them. It stated that for customers who are able to participate in both the utility programs and current ERCOT ancillary services markets, it may be appropriate for the utilities to facilitate the transition once economic dispatch is available. It stated that instead of bringing uncertainty to customers currently participating in the utility programs, especially those unable to participate in the ERCOT market, the rule should direct the utilities to develop demand response that accommodates customers not able to participate in the utilities' programs today and expand demand response. CLEAResult stated that the capacity shortage in Texas requires any and all methods to reduce peak demand be employed. It, therefore, opposed eliminating the utility load management programs and supported greater coordination with ERCOT.

EnerNOC commented that load management types of demand response programs remain a tool for utilities to meet system needs in their local areas in a more focused manner than can be achieved by ERCOT-wide programs. It noted that the Loads in SCED project will have a fundamentally different focus, and therefore value to the grid, than the current utility programs. Particularly, as an economically-based program, participants will provide reductions in response to price signals at their own discretion rather than when called to provide dispatchable capacity for reliability, emergency, or peak demand management purposes at the utility's discretion. Further, it commented that Loads in SCED is only working towards allowing loads with a single point of connection to participate rather than aggregated load like those that participated in the utility programs. It stated that many load management participants would also not be suited to participate in ERS at ERCOT. It commented that a phase-out would negatively affect the maintenance and growth of the utilities' programs in the interim, as the providers will know that the time over which they may able to recoup their investment will be limited. With the capacity concerns in ERCOT, it stated that now is not the time to reduce load management programs. It stated that it is important to recognize the differences in load management and other resources in the ERCOT market, mainly that the underlying providers of the service are retail customers whose primary focus is their normal day-to-day business operations. These customers are not likely to consider enrolling in a demand response program based on uncertain estimates of potential compensation or as little as 10 minutes' notice before their business operations are interrupted. It noted that no market that compensates demand response participants based solely on an energy-only market structure has more than a modicum of participation and a shift to such in ERCOT is unlikely to incent the same level of participation as the current utility programs.

Joint Utilities agreed with the support provided by parties in favor of continuing the energy efficiency load management programs and provided numerous reasons to support their position, including load management programs are essential components of the utilities' energy efficiency programs and have been since PURA §39.905 was adopted in 1999. The programs are vital components of the energy efficiency portfolio, and provide high net benefits as well as reliability benefits. The programs are supported by PURA and commission precedent. Since the original §25.181 was adopted, the commission has found that load management programs were an allowable type of energy efficiency. The commission later expanded the role of load management to facilitate increased participation and ensure adequate capacity is available to meet demand. Utility support for the increased energy efficiency goals was based upon the belief that load management would continue to be an available program option.

According to Joint Utilities, the programs are an integral piece of the utilities' energy efficiency portfolios and a phase-out would require a complete structural change to the program mix of the portfolio. There remains a critical need for many types of demand-side programs due to reliability challenges, and a variety of program options with different features and requirements enables greater participation. The utility programs play a different role than ERCOT-administered load management programs. Specifically, the utility programs can target an individual utility's transmission and distribution system. The programs complement ERCOT's efforts to preserve reliability. Considering projected reserve margins and national policy changes, the programs will continue to be a valuable near-term resource and help balance demand in system emergencies. The commission has acknowledged this recently when approving a significant expansion of the programs for the summer of 2012.

Further, Joint Utilities added, many program participants are not likely to be candidates for participation in the ERCOT market due to the performance and load forecasting requirements, yet will remain candidates for the load management programs. ERCOT has acknowledged the uncertainty that all loads currently participating in the utility programs would migrate to ERCOT-operated markets once economic dispatch is enabled. The necessary technical requirements, qualification criteria, and differences in payment structures established at ERCOT could limit participation. Providing customers a multitude of program options would tend to increase the resources available to the system during an emergency. Additionally, any ERCOT-administered program would be an economic program, which would require participants to curtail usage whenever wholesale prices were at or above their offer price. High prices do not necessarily correspond with the type of reliability event for which curtailments are triggered under the utility programs.

Joint Utilities argued that the Loads in SCED project has an uncertain status and is undergoing substantial redesign at ERCOT's Market Enhancement Task Force. Loads in SCED is likely to have strict standards regarding the predictability of load levels, a minimum curtailment amount of 100 kW at a specific node, communications telemetry, strict noncompliance penalties, and fast response times. Further, a phase-out would seemingly not apply to non-ERCOT utilities, thus creating different program opportunities for different utilities, which would be at odds with the commission's goal of ensuring statewide consistency among the utilities in their program offerings. Certain non-ERCOT customers may have access to programs that their ERCOT equivalents do not.

Joint Utilities stated that, for these reasons, the commission should take further steps to increase, not phase-out, demand reduction opportunities made available through the utility load management programs.

In replies, Joint Utilities maintained that they are committed to working with ERCOT to ensure both ERS and the load management programs are successful in addressing the needs of the market. They clarified that ERCOT is already able to request that the utility programs within its region be dispatched within the program's constraints on the number and duration of curtailments based on the implementation of a memorandum of understanding (MOU) signed by all of the utilities in ERCOT. Therefore, they stated OPUC's key concerns have been addressed for the utili-

ties in ERCOT, and are irrelevant for those outside the ERCOT region. Further, they stated that TX ROSE and TLSC's comments were at odds with nearly all other parties on the issue, and if there truly was such little value in the programs, they would not have been expanded this year with regards to resource adequacy. They appreciated ERCOT's support and its increasing reliance upon the load management programs.

Joint Utilities also provided a response to concerns regarding the load management programs' impact on price signals in the wholesale market. Specifically, they responded that the concerns regarding the program's distortive impact on energy prices seems to be more properly directed to the ERS program, which would presumably have similar, though larger impacts. They noted that the commission recently affirmed its support of ERS and did not order ERS to be transitioned to the Loads in SCED initiative.

Commission response

The commission appreciates the comments provided by all parties regarding this very important issue and the potential impact of greater load participation in ERCOT. The commission will continue to look at ways the role of load can be expanded in the context of resource adequacy as both an energy and capacity resource.

In response to the specific question posed regarding the possible transition of utility load management programs to ERCOT, the commission agrees with Cities, CLEAResult, Comverge, ECI, EnerNOC, Joint Utilities, and Sierra Club that a mandatory transition is not appropriate at this time. While the commission supports and prefers market-based economic dispatch of resources, such a mechanism is not available at this time in the ERCOT market. The commission, therefore, does not disagree with OPUC, NAPP, Public Citizen, SEED Coalition, REP Coalition, TIEC, TX ROSE, and TLSC's preference for market-based dispatch, but contends that this discussion is premature. The commission agrees with EnerNOC that adopting a phase-out of the programs at this time would make it more difficult to attract energy efficiency service providers to the utility programs in the interim. The commission does not wish to limit potential demand response in the face of potential capacity shortfalls in the next few years.

Further, the commission agrees with ECI, EnerNOC, Joint Utilities, Public Citizen, and SEED Coalition that some loads may not be able to participate in the ERCOT market due to technical requirements. The commission also agrees with Cities and Sierra Club that load management programs appeal to smaller, less sophisticated customers. These customers might never have the expertise needed to be able to participate in the ERCOT market and load management provides them an opportunity to participate in demand response activities. Many load management service providers aggregate multiple customers rather than focus on a single customer, which is similar to the activities of ERS providers; the commission agrees with EnerNOC that this aggregation may further limit the ability of customers in the load management programs from transitioning to market-based programs. The commission also agrees with EnerNOC, Joint Utilities, NAPP, and TIEC that load management programs serve a separate purpose and are able to provide benefits such as targeted congestion relief to individual utility systems. Also, the commission agrees with EnerNOC that the load management programs' focus on reliability and peak shaving is fundamentally different than Loads in SCED's focus on economic dispatch. The commission does not believe that additional functionality provided by the utility programs should necessarily be tied to economic dispatch.

The commission recognizes REP Coalition's concerns that load curtailment programs, including the load management programs, can dampen or reverse pricing signals. Similar concerns were raised during the adoption of the new ERS rule under Project Number 39948, *Rulemaking to Amend Substantive Rule §25.507, Relating to Electric Reliability Council of Texas (ERCOT) Emergency Interruptible Load Service (EILS).* The commission continues to believe that while there may be some impact on energy prices due to the deployment of curtailment programs, it is inappropriate to adopt a specific mechanism to mitigate such pricing impacts in the rule. ERCOT stakeholder groups, including the Reliability Deployments Task Force, continue to discuss an approach to mitigating the pricing impacts of all reliability measures taken by ERCOT. The Retail Markets Subcommittee has also discussed pricing mechanisms in relation to retail customers and demand response. The commission believes that such stakeholder groups are the correct forum to address pricing impacts rather than this rule.

The commission believes that many loads will voluntarily migrate to ERCOT programs such as ERS and Loads in SCED when it is launched due to more attractive pricing in those markets for load. For instance, load management incentives average $40 per kW, while ERS (formally EILS) averaged over $47 per kW in 2010. The commission anticipates that the market-clearing price for energy and potential earnings for loads bidding into SCED will also be greater than the load management incentive payments considering the commission recently raised the system-wide offer cap to $4500 MWh. Load participating in ERS is already prohibited from participating in the utility programs during the same interval periods. The commission appreciates similar comments regarding load participation in various programs filed by Cities and Sierra Club. The commission further discusses load participation in utility programs and at ERCOT in response to comments filed in regards to subsection (m)(6).

The commission agrees with Joint Utilities that the load management programs are an integral piece of the utilities' energy efficiency portfolios. PURA §39.905(d)(6) supports the inclusion of customer energy management and demand response programs and subsection (a)(6) requires the utilities to make available load management standard offer programs to industrial customers at the 2007 participation levels. Requiring the utility programs to transition would require a complete structural change to program portfolios. Further, market-based programs are not uniformly available to utilities across Texas. Transitioning the load management programs of the ERCOT utilities would potentially create different opportunities for loads depending on the system operator in their territory and would limit the ability of some utilities to offer programs based on its inclusion in a certain independent system operator or regional transmission organization. The commission agrees with Joint Utilities that this is at odds with the goal of consistency among the utilities in their program offerings and creates an inequality for customers. Therefore, for these reasons and those discussed in further detail below, the commission declines to require the utilities to transition their load management programs at this time. The commission will continue to encourage both economic incentives for loads and the development of security constrained economic dispatch and other mechanisms in the ERCOT market that will attract competitive load participation at ERCOT. The commission agrees with CLEAResult that greater coordination between utilities, their ser-

vice providers and ERCOT is needed to ensure the grid receives the full benefit of the utility programs in the interim.

Cities, CLEAResult, ECI, EnerNOC, and Joint Utilities noted that load management programs are among the most cost-effective of the energy efficiency programs and serve as the foundation for utilities to meet their goals while minimizing overall program costs. EnerNOC commented that utilities should have the flexibility to continue cost-effective programs. Similarly, Cities stated that as a ratepayer-funded program, energy efficiency should be achieved in the most cost-effective manner. They commented that if load management programs are transitioned to ERCOT, it may become difficult for utilities to reach their energy efficiency goals. CLEAResult commented that load management is a cost-effective, quickly deployable product that should be expanded in light of capacity shortages. It commented that if the commission decided to eliminate the load management programs, the cost caps should be raised to reflect the higher costs per kW of traditional programs and incentives.

Joint Utilities stated that any phase-out of the load management programs would significantly increase the cost of meeting the utilities' goals and drive total program costs above the EECRF cost caps. If load management is completely removed from the program portfolio, the average portfolio cost per kW would increase approximately 50% to $630/kW. This, combined with the mandatory increased funding for targeted low-income customers, would further hamstring utilities under the current cost caps.

Separately, Cities stated that it would support a strict cost cap per kW for load management in the utility programs.

Commission response

The commission agrees with Cities, CLEAResult, ECI, EnerNOC, and Joint Utilities that the load management programs have historically proven to be the most cost-effective programs in the utilities' energy efficiency portfolios and that eliminating the programs would make it difficult for utilities to meet their goals under the current cost caps. The commission disagrees with Cities that a separate cost cap is needed for load management programs. All program incentives are capped by the avoided costs set by the commission, currently at $80 per kW. Utility incentives for the load management programs have traditionally been set at half the avoided cost, or $40 per kW. The commission does not believe the incentive payment for load management to be inappropriately high given the benefit the programs provide both utility systems and the grid as a whole, especially given the fact that the payment is substantially below the avoided cost of capacity.

Comverge, Earth Networks, EnerNOC, ERCOT, Joint Utilities, OPUC, Public Citizen, SEED Coalition, and REP Coalition commented on the timelines associated with load management in the interim period prior to the economic dispatch of load in the ERCOT market.

Earth Networks stated that while it may be appropriate to transition the load management products to the ERCOT programs, the utility programs serve an important role in providing a flexible platform for programs to be designed and technologies tested. Once programs are established and achieve a critical mass of participation, they could then be moved to ERCOT. It commented that the current ERS program is structurally not designed with peak load programs in mind.

EnerNOC stated that eliminating the utility programs will strand the load management assets until a later stage of the Loads in SCED project works towards allowing aggregations, which is at least three to four years away. Public Citizen and SEED Coalition stated that a transition to ERCOT through Loads in SCED would take several years, and the utility load management programs should continue until full implementation of the project.

Comverge stated that it believes the load management transition to ERCOT should be based on a vibrant DR environment and a working economic dispatch system capable of accommodating load resources in all segments of the market, including residential customers. Adopting a rule at this point would be based on the supposition that transitioning the programs to the ERCOT markets will work, when the demand response energy market is dominated by large commercial and industrial demand response, with economic dispatch several years from being realized.

Joint Utilities agreed with parties who recognized that there will be some ongoing need for utility load management programs even after Loads in SCED is launched by ERCOT and that the proposed transition may be premature.

OPUC stated that the utilities should be required to transition their load management programs to ERCOT once the logistics of participation in the ERCOT markets have been finalized. Similarly, REP Coalition provided modifications under proposed subsection (m)(6) that would facilitate the continued operation of utility load management programs during the period preceding the transition and integration of its participating load within the framework of ERCOT's competitive energy markets. It stated that many of the arguments in opposition to transitioning the load management programs to ERCOT's competitive energy markets lack merit in view of the purpose of the transition requirement and the current estimated timetable for triggering it. It commented that several comments indicate confusion about the trigger that transitions the load management programs participation in the competitive energy market. It noted that the trigger allows for the continued operation of utility programs that cannot be "feasibly" integrated to participate at ERCOT and the Loads in SCED project will not necessarily cause the feasibility component to be met. Feasibility may vary according to customer class or subclass, which will determine if and/or when the load transitions.

ERCOT did not take a position on the transition of the utility programs, but commented that any integration should not depend on the Loads in SCED project. If in the future loads and demand response can ultimately offer into SCED, it stated that it is unlikely that all load management participants will be able to participate and some loads may be better served by participating in ERS. It commented that a 30-minute ERS pilot has been recently proposed, but at this time, it does not have sufficient information to determine whether a 30-minute product will provide operational benefits, justifying full integration into the Protocols, or even if a 60-minute product would be valuable. The utility programs accommodate 30-minute and 60-minute response times, so it is unclear whether and to what extent the current participants would be able to participate in ERS should the programs be phased-out. It noted that some load management growth appears to have come at the expense of ERS, which traditionally has a 10-minute response time. It commented that possible reasons for the migration of loads to the utility programs include less restrictive performance requirements and higher payments.

Commission response

As discussed above, the commission agrees with Comverge, EnerNOC, and Joint Utilities and believes that economic dispatch is several years away from realization and any transition of load management programs to the ERCOT energy markets is premature. The commission appreciates REP Coalition's comments regarding transition timelines and the feasibility of integration. Specifically, the commission agrees that feasibility may vary according to customer class or subclass. The commission agrees with EnerNOC, Public Citizen, and SEED Coalition that the development of Loads in SCED will take several years. The commission agrees with ERCOT and determines that it is not appropriate to tie any utility integration to the Loads in SCED initiative. Current load management service providers need the ability to bid in aggregated loads prior to even considering participation in the ERCOT market. This capability is not in development for the initial launch of economic dispatch for loads. The commission agrees with ERCOT that it is unlikely all utility program participants will be able to participate at ERCOT and that even new ERS pilot programs may not appeal to current program participants. Further, the commission agrees with Earth Networks that utility programs remain an important, flexible platform for program development and technology testing in both residential demand response and load management. The commission maintains that when economic and feasible, loads will voluntarily transition to ERCOT programs and the utility programs will remain an option for load management participants unable to transition and for separate utility purposes.

REP Coalition stated that given that transition and integration of all utility programs might not be feasible, the commission should ensure that deployment of load by a program retained by a utility should occur at the same time that ERS is deployed pursuant to the ERCOT Nodal Protocols. Joint Utilities stated that REP Coalition comments fail to allow for programs to meet local utility system needs through load management.

Commission response

The commission recognizes the need for utilities to be able to deploy load management resources for their own local reliability and system concerns. While the commission appreciates REP Coalition's recommendation, ERS and the utility programs serve different purposes and requiring them to be deployed at the same time would not allow ERCOT or the utilities any latitude in utilizing the programs outside of an energy emergency. The commission believes that ERCOT and Joint Utilities should continue to be provided flexibility in the manner in which they coordinate the dispatch of load management resources.

Until load management can be moved to a market-based mechanism, TX ROSE and TLSC recommended that load management and demand response be limited to 15% of the demand reduction goal, as it has in the past. They also requested that a cap be placed on the incentive level for such programs. In replies, EnerNOC asked the commission to reject TX ROSE and TLSC's suggestion to limit the amount of load management and demand response in the program. It noted that this was in direct contrast to recommendations in the Brattle Group Report, citing the need for more demand response in the energy-only market to support ERCOT's current reliability targets. Joint Utilities also requested that the commission reject TX ROSE and TLSC's request. They agreed with EnerNOC that, in light of ERCOT's resource adequacy situation, more load management is needed. They commented that they had moved to increase the programs as recently as five months ago to address summer 2012 resource adequacy concerns.

Commission response

The commission disagrees with TX ROSE and TLSC's recommendation to reinstall a limit on the amount of load management and demand response allowable under the energy efficiency program. While the order adopting the original §25.181 established a cap of 15% of the overall demand savings for the load management programs, the commission has worked to expand the program in subsequent proceedings. *See Project Number 21074, Energy Efficiency Programs.* Specifically, the commission cited resource adequacy concerns when raising the incentive levels and amount of permissible load management to 30% of overall demand savings when amendments to the rule were approved in 2005 in *Project Number 30331, Amendments to Energy Efficiency Rules and Templates.* The commission removed the restriction completely when further amendments were adopted in 2008 in *Project Number 33487, Amendments to Energy Efficiency Rules and Templates.* As noted by EnerNOC and Joint Utilities, the state is facing a similar capacity shortage to that cited in the 2005 order. While the commission has worked with ERCOT since 2005 to create ancillary service programs such as ERS to create additional opportunities for load to provide capacity in the ERCOT region, resource adequacy concerns necessitate ERCOT having access to as many load curtailment options as possible. The commission believes that imposing a strict limit on the size of load management programs is inappropriate at this time.

ECI and Comverge requested a broader review of load management in light of possible economic dispatch in the ERCOT markets. ECI stated that it recommends the commission sever the questions posed in the preamble regarding the utility load management programs from this docket and open a new docket to address these issues. It commented that the issues posed are only a subset of the issues that the commission should be addressing in order to facilitate load management programs, and an overall strategy for demand response in the ERCOT market should be undertaken. Comverge stated that the commission should consider a broader review after the market demonstrates that the economic dispatch of loads is a success and of economic dispatch will be sufficient to address reliability needs or there is still a needed reliability backstop.

Commission response

The commission appreciates the comments of Comverge and ECI regarding the need for a broader review of load management. The commission has several projects currently devoted to reviewing demand response in the context of resource adequacy and changes in the market. Specifically, the commission is reviewing the broad topic of resource adequacy in Project Number 40000, *Commission Proceeding to Ensure Resource Adequacy in Texas.* The project will allow commission discussions to continue regarding recommendations made in the Brattle Group's report on ERCOT investment incentives and resource adequacy, including any particular recommendations or comments made in the report referenced by parties in comments on the proposed rule. The commission also continues to explore technologies enabling advanced metering-related demand response in Project Number 34610, *Implementation Project Relating to Advanced Metering.* Commission staff continuously monitors ERCOT stakeholder processes, protocol revision requests, and initiatives, including Loads in SCED. The commission will open projects as needed when activities at ERCOT necessitate specific commission action. The specific utility programs will continue, at this point, to be discussed

through the EEIP process. Economic dispatch, resource adequacy, and demand response technologies will be discussed in their respective projects and through the ERCOT stakeholder processes.

Preamble question two:

Earth Networks, EnerNOC, Joint Utilities, NAPP and Sierra Club stated that there is no need to formalize performance standards in the rule.

Earth Networks and NAPP commented that the utilities should retain the ability to develop new programs and establish the performance standards as needed for each program. NAPP noted that a one size fits all standard is not appropriate and for loads participating in the ERCOT market, ERCOT should be able to impose appropriate standards. Joint Utilities stated that the performance standards established by the utilities are already adequately documented in their program manuals. EnerNOC commented that performance standards similar to ERS are not needed and moreover, to the extent a utility desires to adopt performance standards similar to the ERS standards, they already have that flexibility. Sierra Club stated that ERS and other ERCOT programs are regulated programs intended for emergencies. It noted that the utility programs under the proposed rule have mechanisms, such as the proposed EM&V provisions and EECRF proceedings, which would give concerned interests the ability to question any of the programs.

ECI, ERCOT, Public Citizen, SEED Coalition, and TIEC commented that load management programs should not necessarily require the *same level* of performance standards as the ERS program. While ERCOT maintained a neutral position on whether load management programs should be transitioned to ERCOT control in the future, it commented that if the programs are to be completely integrated into ERCOT's administration, more standardization is required. It noted that it is already working with the utilities on the coordination and deployment of the load resources in the program by ERCOT during declared Energy Emergency Alert (EEA) events. In replies, EnerNOC commented that the required standardizations noted by ERCOT should the utilities' programs come under its control limit the very aspects of the utility programs that enable a broader scope or participations.

Public Citizen and SEED Coalition stated that while the same level of standards required by ERS are not necessary, some standardization would insure equal treatment and participation amongst program participants. TIEC stated that if the utilities continue to operate load management programs, performance requirements may be appropriate, but any transitioned load should be held to the same testing, qualification and performance requirements that apply to all other ERCOT market participants. They maintained that transitioned loads must be treated like any other market participants and should not be subsidized or afforded any other special treatments that are not available to competitors.

ECI stated that the commission should not develop performance standards for the utility programs that are similar to ERS. It stated that it believes the ERS performance standards remain a major barrier for customer participation in ERS. Further, the current compliance and enforcement policies ERCOT utilizes for ERS are the strictest in the nation and results in providers de-rating their capacity in the program to avoid suspension for noncompliance. It recommended, at a minimum, the commission wait until ERCOT evaluates the alternative compliance mechanisms proposed in ERCOT's 30-minute pilot prior to determining a basic set of performance standards.

Comverge, OPUC, and REP Coalition stated that availability and performance standards like those developed for ERS are appropriate for utility programs and supported uniform standards among the utilities. Comverge recommended the utilities be given sufficient time to develop and file standards rather than the commission adopting such standards immediately. OPUC commented that the commission should develop performance standards similar to ERS, but maintained that the programs should be transitioned to ERCOT rather than remain in the energy efficiency program.

REP Coalition stated that given potential overlap of load participants between utility programs and ERS, it supports the development of performance standards for the utility programs that are comparable to the ERS standards in §25.507. REP Coalition commented that this would ensure that the utility programs would not compete with or undermine ERS by offering incentives to loads without subjecting them to a corresponding level of performance standards for their obligations. During replies, REP Coalition stated that it does not view Joint Utilities' response with much comfort, as it is clear the performance standards adopted by the utilities for the curtailment and load management programs are not comparable to the current ERS standards. Further, it stated that ERCOT's response was extremely telling of the purpose of the performance standards issue. It specifically noted that failure to perform under the utility programs merely results in a reduced payment, while non-performance is subject to an administrative penalty under the ERCOT administered ERS program. It maintained that a reasonable equivalency between programs should exist between the standards of performance for participating loads and the manner in which those standards are applied.

EnerNOC disagreed with OPUC and REP Coalition, stating that the commission should reject REP Coalition and OPUC's request for uniform performance standards, as preferences demonstrated by participants in these programs should be viewed as an opportunity for ERCOT or the utilities to learn what standards help the success of their programs compared to other programs.

Commission response

The commission would like to clarify that the question posed by the commission along with the proposed rule refers to potentially developing performance standards for the load management programs administered by the utilities and not any future load management that might be transitioned to ERCOT. The commission agrees with ERCOT and TIEC that once loads transition away from the utilities' programs and begin participating in the ERCOT market, they should be held to the same compliance standards as other market participants and all applicable protocols. Any transitioned load would also be subject to the same penalties as any other load participating in the competitive market.

The commission also notes that if a utility is deploying load in response to an ERCOT directive per the MOU, then failure to perform could have an impact on system reliability. The commission, however, agrees with Earth Networks, EnerNOC, Joint Utilities, NAPP, and Sierra Club that there is no need to formalize performance standards in the rule. The utilities have worked with ERCOT in the last year to coordinate deployment of utility load management programs in accordance with the MOU. This

process will ensure some level of standardization, as requested by Public Citizen and SEED Coalition. The commission believes that precedent has shown that it is appropriate for utilities to continue to have the latitude to develop performance standards and penalties should any program participant fail to meet their obligations. Currently, non-compliance results in the utilities either reducing incentive payments or excluding certain loads from participation in the future. The commission believes these penalties are appropriate given the nature of the utilities' programs. Statute necessitates that utilities in areas open to competition must rely on energy efficiency service providers to find and contract load to participate in the programs, except in limited circumstances for rural areas. It is in the best interest of the provider to meet the minimum requirements of the utility to ensure continued inclusion in the program.

As stated above, the commission agrees that allowing the utilities to develop their own performance standards and coordinate the load management programs with ERCOT continues to be the best course of action at this time. The commission disagrees with ECI that the standards similar to ERS should specifically not be used for the load management programs. If the utility finds such standards to be effective for their program, they should have the flexibility to adopt similar requirements. The commission also disagrees with OPUC and REP Coalition that one-size-fits-all standards are the best course of action at this time. Each utility has a unique service territory with varying climate, customer mix, dominant type of air conditioning, housing stock, and commercial operations. One-size-fits-all standards could hinder the ability of a utility to design standard offer load management programs that are able to best serve the customers in its service territory. The commission appreciates Comverge's comments and agrees that if standards are developed in the future, the utilities should be given sufficient time to develop and file the standards rather than the commission adopt the standards by rule.

Public Citizen and SEED Coalition stated that they recommend any participants using back-up generation to meet their obligations be required to register with the Texas Commission on Environmental Quality and follow the appropriate standards.

Commission response

The commission recognizes the need for generation resources to meet all applicable emissions and standards requirements. The commission believes, however, that it is up to the operators of distributed generation units to be aware of all applicable rules and regulations pertaining to their operation. As discussed in the order adopting Project Number 39948, distributed generation operators are responsible for all regulations and if they are not able to participate in a manner consistent with regulations imposed by other agencies, the commission would expect them to refrain from participating in the program.

Comverge, Earth Networks, ECI, EnerNOC, NAPP, Public Citizen, SEED Coalition, and Sierra Club did not oppose allowing the utilities to offer incentives for equipment and installation to enable customer participation in load management programs, including those participating in the ERCOT markets. NAPP stated that it supports utilities offering incentives to load for equipment, as well as allowing the utilities to count one or two years of demand and energy savings towards meeting the goals. It commented that the cost of equipment is still a barrier to demand response participation. In replies, NAPP maintained support for utilities offering incentives for load control equipment to facilitate participation in the ERCOT market, especially to help overcome the initial costs of implementation for applications such as pool pumps and residential demand response. It stated that some commenters seemed to misunderstand that the utility would not actually own the equipment, but rather the incentive payment would be used by the provider to offset the customer's purchase of the enabling equipment in exchange for an agreement with respect to the use of the equipment. Further, it commented that this would be an appropriate market transformation program to take full advantage of the new advanced meter infrastructure and savings associated with the equipment should be counted towards the utilities' goals.

Earth Networks stated that allowing the incentive funds would help overcome the high implementation costs and add a level of assurance to new participants who might be less familiar with grid reliability and demand issues. Removing this financial barrier would accelerate adoption. It commented that utilities should be able to claim the resulting energy savings for at least the first year. ECI commented that utilities should be allowed to offer incentives for the purchase of equipment for customer participation in the ERCOT market. It commented that while ERCOT has high smart meter deployment numbers, it lacks premise-based curtailment equipment and pricing programs to fully appreciate demand response in the market. It commented that equipment should be marketed through service providers able to offer subsidized equipment to customers. Savings should be counted to the utilities' goals, but how any savings would be calculated need further exploration.

Public Citizen and SEED Coalition recommended that if equipment is paid for with program dollars, it should be compatible with the guidelines setup in the AMIT process and be configured and controlled by authorized entities. They stated that if these conditions are followed, savings should be allowed to be counted towards the utilities' goals. Sierra Club stated that if the utility incentivizes equipment needed to participate in the ERCOT market, it should only be able to claim savings for the program year the incentive was paid. EnerNOC commented that utilities should continue to have authority to develop programs that suit their particular needs and modify their programs without petitioning the commission for a good cause exception. Comverge stated that simply providing customers control equipment in the current environment will not result in a significant increase in customer participation in the ERCOT markets since the equipment needs to be connected to a service provider that sends signals to initiate load reductions and financial incentive to install the equipment.

While ERCOT and Joint Utilities took no position on whether equipment incentives should be offered by the utilities, each provided additional input should the commission decide to allow such equipment in the program. Specifically, Joint Utilities noted that some justification would be required for spending energy efficiency funds for such a purpose. They stated that if a utility did incentivize the equipment, then the resulting demand reduction should be credited to the utility's goal to properly justify the cost. Further, the savings calculations should be left to ERCOT and its stakeholder process, and the resulting demand reduction and energy savings calculated by ERCOT should then be adopted by the utilities. ERCOT commented that the right incentives and equipment could foster greater participation in all demand response programs, especially for residential customers who account for 50% of peak load.

EnerNOC, OPUC, the REP Coalition, TIEC, TX ROSE, and TLSC commented that utilities should not offer incentives for

load control equipment to enable participation in the ERCOT market. TIEC commented that all ERCOT market participants are responsible for the costs of any necessary equipment required to participate in the market and utilities should not subsidize equipment for loads through their programs. They believed that such a program would give those loads a competitive advantage over current market participants, which is discriminatory and violates PURA §39.001(c). They stated that utility load management programs that receive ratepayer-funded incentive payments must remain separate from the ERCOT markets, including any program in which a utility installs equipment to enable participation in the ERCOT market. Similarly, EnerNOC noted that currently customers or providers bear the cost of such equipment and based on the number of companies in the market, there is no indication that there is a failure in the competitive market due to the cost of this equipment. Further, the cost of the equipment should be a cost of doing business for the customer or provider and not reduce the already limited funds available through the energy efficiency programs. In replies, EnerNOC stated that while it appreciates the difficulties mentioned by ERCOT associated with tapping the region's potential demand response capabilities, significant competition among companies seeking to aggregate commercial load and provide demand response services shows that there does not appear to be a significant need for incentives for equipment to enable participation in the market. If incentives are made available, it recommends that the commission limit such incentives to residential customers.

TX ROSE and TLSC also stated its belief that the ERCOT and utility programs should be separate; utility incentives should not be used to subsidize participation in the ERCOT market, and any savings should not be counted towards to utility's goal. They commented that the commission should require instead for all customers to be financially compensated for interruption of their load, rather than allow the incentive to be kept by the provider to help cover the cost of load control equipment. REP Coalition did not support allowing utilities to purchase equipment or offer incentives relating to such load-enabling equipment for the purpose of enabling participating in the ERCOT market, particularly if the utility is allowed to own the equipment. It stated that any legacy utility load management program should continue to allow the energy efficiency service provider to determine how to use the incentive payment, which may include purchasing equipment to be owned by the customer or provider. OPUC stated that the utilities should not offer incentives for load curtailment equipment, nor should savings from such equipment be counted towards their goals.

Commission response

The commission would like to clarify that utilities currently have the ability to offer demand response programs that provide incentives to customers for the installation of equipment to facilitate their participation in the utilities' programs. For example, CenterPoint is running a REP standard offer pilot program that provides incentives towards the costs of installing direct load control equipment, smart thermostats, and in-home devices. The savings claimed from demand response resulting from the CenterPoint program are allowed in accordance with this section. After the customer has honored the contract signed with the energy efficiency service provider, the equipment is their own and may be used by the load to further participate in a utility program. Once ERCOT allows the aggregation of loads, the customer could use their equipment to participate in the ERCOT market. The question posed by the commission along with the proposed rule instead refers to allowing energy efficiency incentives for the purchase of equipment for the direct purpose of participating in the ERCOT markets.

That said, the commission agrees with EnerNOC, OPUC, REP Coalition, TIEC, TX ROSE, and TLSC that utilities should not offer incentives for the singular purpose of allowing loads to participate in the ERCOT market. The commission appreciates EnerNOC's comments that there is already significant competition amongst companies seeking to aggregate commercial load and provide demand response services; competitive forces may encourage competitors to offer equipment to loads as an incentive for them to sign up with a particular aggregator. The commission agrees that REPs, aggregators, and loads that wish to participate in the ERCOT markets need to weigh the costs of installing any required equipment against the expected compensation from the market and make their own economic decision.

Section 25.181. Energy Efficiency Goal.

Subsection (a); Purpose

No comments.

Subsection (b); Application

No comments.

Subsection (c); Definitions

Subsection (c)(2); Baseline

TX ROSE and TLSC opined that utilities should claim and pay for only those incentives that occur as a result of their energy efficiency program and agreed in principle with the use of a baseline. They suggested that the commission replace the proposed definition for baseline with one based on standards used by the California Public Utilities Commission that states that a baseline should be established based on applicable state and/or federal efficiency standards for appliance or building energy efficiency, the efficiency of equipment being sold in the market for common replacement, or current design practices as defined by the program evaluated.

Commission response

The commission agrees with TX ROSE and TLSC that utilities should only claim and pay for incentives that occur as a result of their energy efficiency program. The commission notes that the proposed definition of baseline is broad enough to count savings from the standard to the newly installed higher efficiency measure and to take into account early replacement programs where a consumer has a working piece of equipment or system and the energy efficiency program convinces the consumer to replace the measure early. In this case, the baseline would not be based on the standard but on the existing measure because the consumer would not have replaced it without the program. Savings would be based on the difference between the efficient measure and the existing measure until the end of the existing measure's estimated life and then reduced to the difference between the efficient measure and the standard at that time. This is standard practice for early replacement programs and the commission's definition is consistent with standard practice, including requests for new or amended deemed savings for equipment retrofits. The purpose of the baseline is discussed below in more detail in the discussion related to subsection (q)(8). Therefore, the commission declines to adopt changes suggested by TX ROSE and TLSC to the proposed definition.

Subsection (c)(6); Conservation load factor

Sierra Club suggested that the definition of conservation load factor be revised to remove the reference to the goals and simply state that the load factor is the ratio of energy savings to peak demand. It justified this request by stating that the load factor should be applied to all peak demand achieved, not just the peak demand goal.

EDF stated that the current definition of conservation load factor captures all kWh achieved by a program but only the kW goal and therefore leaves the true capacity factor of programs undetermined. It noted that utilities have historically exceeded their goals. It also suggested that the conservation load factor be tied to peak demand achieved rather than the peak demand goal. It opined that the concept of capacity factor is to measure kWh achievement relative to kW demand achievement.

Commission response

The commission notes that a utility is required to administer a portfolio of energy efficiency programs designed to achieve the minimum demand and energy savings goals, as defined in subsection (e). The conservation load factor is used to determine a utility's energy savings goal for the year. To calculate the utility's energy savings goal, a utility's demand goal (kW) is first multiplied by the number of hours in the year and then multiplied by the conservation load factor. Should a utility exceed its goal at a cost that does not exceed the cost caps, it will be awarded a performance bonus. The proposed definition correctly captures the purpose of the conservation load factor in the context of this section. The commission, therefore, declines to adopt the revisions requested by Sierra Club and EDF.

Subsection (c)(7); Deemed savings calculation

OPUC suggested that the deemed savings calculation should be an industry-wide standard rather than an agreed upon standard as proposed in the rule. It recommended that the proposed definition of deemed savings calculation be modified to reflect this change.

Commission response

In order to ensure that calculations of deemed savings are reasonable and consistent, the commission agrees with OPUC that the deemed savings calculation should be consistent with the industry-wide accepted standard and therefore adopts the modification provided to the proposed definition.

Subsection (c)(11); Eligible customers

OPUC proposed that the definition of eligible customers be revised to include all customers in all classes. It stated that the proposed definition limits the participation of industrial classes solely to load management standard offer programs in place prior to May 1, 2007. It commented that there is, however, no provision in PURA that prevents or prohibits an industrial customer from participating in any of the utilities' programs. It noted that PURA §39.905(a)(2) sets out a goal that all customers in all classes have access to energy efficiency programs; PURA §39.905(a)(3) requires utilities to provide standard offer or market transformation programs to residential and commercial customers; and PURA §39.905(a)(6) requires utilities to provide grandfathered load management programs to the industrial class. It suggested that a proper reading of PURA results in the conclusion that a utility may offer an industrial customer an energy efficiency program and the industrial customer may participate in the program.

OPUC stressed that it in order to be compliant with PURA §39.905(a)(2), it is incumbent upon utilities to provide programs for the industrial class. Load management programs are the minimum that the utilities should offer to the industrial class. It commented that legislative history surrounding the above-referenced sections leads to the conclusion that the Legislature was not limiting industrial class participation in energy efficiency programs to grandfathered load management programs but was trying to ensure that those programs would be continued amid concerns surrounding declining reserve margins.

Public Citizen and SEED Coalition agreed with all of OPUC's comments and added that the industrial class has the largest potential savings when compared to the residential and commercial class and noted a study by the Department of Energy (DOE) Oak Ridge Labs prepared for ERCOT that proves this point. Public Citizen and SEED Coalition proposed that the commission add a self-directed or other suitable program for the industrial class.

TIEC disagreed with OPUC's claim that there is no exclusion in PURA from the energy efficiency mandate for industrial customers, as detailed in their comments pertaining to the definition for industrial customer (subsection (c)(30)).

Commission response

In House Bill (HB) 3693 of the 80th Legislature, Regular Session in 2007, the Legislature added language to PURA §39.905(a) and (b) to clarify that the energy efficiency goals and programs under the statute were to be oriented to residential and commercial customers, and that it is these customers receiving services under the programs that are to bear the cost of the programs. PURA §39.905(a)(3) now specifically limits a utility's energy efficiency programs to residential and commercial customers. As the commission stated at page 22 of the order adopting a new version of this rule in Project Number 33487, "The clear import of the amendments in HB 3693 was to curtail industrial programs, except to the extent that they are grandfathered under PURA §39.905(a)(6)." In SB 1125 of the 82nd Legislature, Regular Session, in 2011, the Legislature further emphasized this principle of cost responsibility by amending PURA §39.905(b)(4) to clarify that the performance bonus should also be borne by the customer classes receiving services. The commission believes that these policy decisions have already been made by the Legislature, and it is now the function of the commission to effectuate those decisions.

The commission declines to adopt OPUC's recommended changes. As discussed above, the commission stated in Project Number 33487, and maintains, that the purpose of the amendments in HB 3693 was to curtail industrial programs, except to the extent such programs were grandfathered under PURA §39.905(a)(6). It would be contrary to the Legislative intent to broaden the definition of "eligible customers" to increase the ability of industrial customers to participate in, and to increase the requirement that such customers pay for, the energy efficiency programs established pursuant to the statute and rule.

Subsection (c)(12); Energy efficiency

TX CHPI proposed modifying the language in the definition of energy efficiency in order to include actions taken by a customer that lowers the demand of energy delivered to the customer.

Commission response

The commission appreciates the comments of TX CHPI and recognizes the importance of actions taken by a customer to lower the demand for energy delivered to the customer. Because the definition of energy efficiency as proposed does not exclude actions taken by a customer to lower the demand for energy deliv-

ered to a customer, but rather is broad enough to incorporate it, the commission declines to adopt the requested amendment.

Subsection (c)(13); Energy Efficiency Cost Recovery Factor (EECRF)

TNMP suggested that the definition of Energy Efficiency Cost Recovery Factor (EECRF) be revised to include all the expenditures listed in subsection (f)(2), including the requirement that it must satisfy the goal of PURA §39.905.

Commission response

In response to TNMP's suggestions, the commission notes that listing the expenditures included in subsection (f)(2) (now subsection (f)(1)) is not necessary since compliance with subsection (f) is referenced in the definition. However, the commission appreciates the suggestion to expand the definition to include the fact that the EECRF must satisfy the goal of PURA §39.905 and therefore amends adopted subsection (c)(13) accordingly.

Subsection (c)(14); Energy efficiency measures

TX CHPI recommended changing the definition of energy efficiency measures to clarify that the measures are implemented on the customer's side of the meter and result in a reduction in consumption or peak demand measured on the customer's side of the meter. They suggested expanding the list of measures to include all varieties of active and passive demand side management, distributed renewable energy systems, and combined heat and power systems. They suggested that energy efficiency measures should not include any approach that simply lowers the level of service to customers.

TAS and Natgun requested that the proposed rule be amended to allow chilling plants at generation facilities to be eligible as potential participants in the energy efficiency program.

Commission response

The commission agrees in part with TX CHPI. In response to the first part of TX CHPI's suggestion, the commission agrees to clarify the proposed definition to state that energy efficiency measures are implemented on the customer's side of the meter. However, since measuring reduction in consumption or peak demand at the customer's site is part of a utility's verification process, the commission declines to make the suggested amendments to the definition regarding the measurement of consumption or peak demand at the customer's meter. Furthermore, the commission notes that the proposed definition is broad enough to include all varieties of active and passive demand-side management, distributed renewable energy systems, and combined heat and power systems. Rather than add a list that might exclude a measure, the commission maintains the inclusive definition. With regard to TX CHPI's recommendation to include a statement in the proposed definition that energy efficiency measures do not include any approach that simply lowers the level of service to a customer, the commission points out that the definition of energy efficiency already precludes this possibility. Therefore, the commission declines TX CHPI's further amendments to the proposed definition.

The commission declines to adopt the amendment requested by TAS and Natgun. As discussed previously, PURA §39.905(a)(3) specifically limits a utility's energy efficiency programs to residential and commercial customers. A generation facility is not a residential or commercial customer as those terms are used in PURA §39.905 and is therefore not eligible for energy efficiency programs under PURA §39.905. Furthermore, providing an energy efficiency program that is available only to generation facilities with chilling units would raise concerns under PURA §39.905(a)(1), which requires that the energy efficiency programs be administered in a market-neutral manner.

Subsection (c)(17); Energy efficiency service provider

TX ROSE and TLSC initially suggested that the commission revise the proposed definition of energy efficiency service provider to acknowledge that an energy efficiency service provider can be either a person or entity that installs energy efficiency measures or performs other energy efficiency services under this section. They also suggested striking the last sentence of the definition which states that an energy efficiency provider may be a governmental entity.

Cities opposed TX ROSE and TLSC's request to strike the last sentence in the proposed definition, stating that the energy efficiency of governmental facilities is in the public interest. They commented that governmental entities should be able to apply energy efficiency services to governmental facilities in the most cost efficient manner, which may include acting as the energy efficiency service provider.

TX ROSE and TLSC responded by clarifying that their intent was to ensure that non-profit entities could also qualify as energy service providers and therefore modified their request and suggested that the last sentence of the definition instead be expanded by adding that an energy service provider may be a governmental entity or a non-profit corporation.

Commission response

The commission agrees that an energy efficiency service provider may be a governmental entity or a non-profit organization and therefore agrees that it is appropriate to amend the definition of energy efficiency service provider, as requested by TX ROSE and TLSC. The commission has also amended the definition to clarify that the term is not intended to include an electric utility.

The commission appreciates Cities' comments and agrees that a governmental entity should be able to provide energy efficiency services in a cost-effective manner and that an energy efficiency service provider may be a governmental entity.

Subsection (c)(19); Estimated useful life (EUL)

For the definition of estimated useful life (EUL), TX ROSE and TLSC recommended that the statement that the EUL is the number of years until 50% of installed measures are still operable and providing savings be replaced with language that states the EUL is an estimate of the median number of years that the measures installed under a program are still in place and operable.

Commission response

The proposed definition of EUL was included in the final order of Docket Number 36779, *Joint Petition of Electric Utility Marketing Managers of Texas to Revise Existing Estimated Useful Life Values,* at Finding of Fact 33, which states: "EUL is commonly defined as the number of years until 50% of installed measures are still operable and providing savings, and is used interchangeably with the term "measure life". The EUL determines the period of time over which the benefits of the energy efficiency measure are expected to accrue." The commission declines TX ROSE and TLSC's requested change, because they provided no justification for not using the common definition of EUL as stated in Docket Number 36779.

Subsection (c)(30); Industrial customer

TIEC supported the commission's proposed definition of industrial customer and stated that it is compliant with PURA §39.905(a)(3), which they stated provides that only residential and commercial customers are eligible to receive services through utility sponsored programs. They commented that the commission's initial approach of excluding transmission-level customers did not give full effect to PURA §39.905 since industrial customers that were not in a transmission-level rate class had to pay energy efficiency costs despite their statutory exclusion.

Cities, EDF, EnerNOC, and CLEAResult suggested that the proposed definition of industrial customer be deleted. The Joint Utilities, with the exception of CenterPoint Energy, also opposed the proposed definition of industrial customer. Pepco remarked that they felt the proposed language for industrial customer is too broad. OPUC, Sierra Club, Public Citizen, and SEED Coalition opposed the proposed definition of industrial customer and suggested that the definition be narrowed to only include a for-profit entity engaged in an industrial process taking electric service at a transmission voltage.

With regard to SB 1125, EnerNOC commented that there is nothing in SB 1125 or any other enacted statute that requires the commission to adopt the proposed broader definition of industrial customer. Similarly, EDF opined that there is no indication that it was ever the legislative intent of SB 1125 that commercial operations connected to certain industrial processes be exempt from energy efficiency programs. EnerNOC noted that TIEC argued that a revised definition is necessary to give full effect to PURA §39.905. EnerNOC commented that the Legislature could have adopted clarifying amendments to PURA §39.905 as part of its consideration of SB 1125, but it did not.

Although CLEAResult acknowledged that the statute exempts industrial customers taking service at 69kV and above from participation in energy efficiency programs, it, Joint Utilities, and Sierra Club stated that there is no statutory direction to extend an "opt-out" provision for customers served at distribution voltage. The Joint Utilities added that, to the contrary, the Legislature's goal of ensuring that all customers in all classes have a choice of and access to energy efficiency alternatives suggest that an opt-out should not be permitted. They noted that where the Legislature intended to exclude a group of customers from an analogous requirement, it has explicitly done so as evidenced by PURA §39.904(m-l), *Goal for Renewable Energy.*

Cities noted that PURA does not exempt individual customers from paying for energy efficiency programs and contended that the definition in the proposed rule contradicts PURA §39.905(b)(4) by exempting customers from paying for energy efficiency programs in whatever customer class they are grouped. They further noted that any exemption extends only to a customer class that does not receive energy efficiency services from utility programs. They stated that TIEC and Walmart err in their interpretation of PURA.

TIEC commented that Cities mistakenly conflates customer class with rate class by their contention that industrial customers cannot be exempt from energy efficiency mandates. They noted that customer class designations are based on how a customer uses the electricity it consumes. They purported that a customer engaging in an industrial process is a member of the industrial class and exempt from the energy efficiency mandates regardless of the rate class it is assigned to by a utility.

Both Cities and OPUC opined that the proposed rule violates PURA §36.003. Cities stated that the definition would establish discriminatory rates within a customer class by exempting certain customers from paying EECRF charges while other members of the class would not be exempt. OPUC stated that the proposed rule violates PURA §36.003 by discriminating within a customer class by allowing certain customers to opt-out of the energy efficiency program based on the type of business taking place at the premise.

TIEC disagreed with OPUC and asserted that the opt-out for distribution-level industrial customers does not violate PURA §36.003 because the Legislature applied the exemption from energy efficiency mandates to the entire industrial class.

Cities, Public Citizen, and SEED Coalition objected to the fact that the proposed definition of industrial customer is tied to those for-profit entities that are tax exempt under Tax Code §151.317. Cities commented that under this statutory provision, entities may be tax exempt if they take electric service at distribution voltage for the purpose of powering equipment under Tax Code §151.318. Cities concluded that the definition of industrial customer would be difficult, if not impossible, to implement due to the legal uncertainty surrounding the interpretation of Tax Code §151.318 currently underway. Additionally, Cities, Joint Utilities, and EnerNOC recalled that the commission previously declined TIEC's proposal to define an industrial customer using Tax Code §151.317 in their final order in Project Number 33487.

TIEC refuted Cities comments and stated that the legal uncertainty surrounding Tax Code §151.318, which has to do with sales tax treatment of equipment used in oil and gas recovery, has no impact on the eligibility of industrial customers for the electricity tax exemption under Tax Code §151.317.

EnerNOC warned that the proposed definition could result in a potentially large group of non-residential customers being classified as industrial customers and noted that the proposed rule does not provide a definition of what constitutes an "industrial process" for purposes of the definition. It remarked that the broad definition of industrial customer is inconsistent with the commission's other definitions in §25.311 and §25.431. Pepco warned that Tax Code §151.317 appears to encompass makers of any product regardless of size, market served, or strategic importance. Joint Utilities remarked that they were unclear how electric accounts, which have no manufacturing or industrial activities but are affiliated with an industrial account, should be handled.

TIEC responded to EnerNOC's comments that the definition of industrial customer is too broad by proposing additional language to the rule that refines it by clarifying that an industrial customer does not purchase electricity under a utility's residential rate schedule but rather purchases electricity under a utility's rate schedule that is based on metered demand.

Cities claimed that the definition as proposed would effectively double the amount of the EECRF charge for commercial customers who could not opt-out of the energy efficiency program since the applicable size of the commercial class would be cut in half. CLEAResult, Public Citizen, and SEED Coalition opined that extension of the opt-out provision to certain distribution customers unfairly burdens other customers who cannot opt-out.

Similarly, Joint Utilities commented that energy efficiency goals are based on a five-year average of load growth measured at the utilities annual system peak and have been historically calculated using load figures that included customers who would be

eligible to opt-out. Joint Utilities and Cities warned that without adequate adjustment to these goals, costs would shift to remaining customers resulting in an increase in EECRF charges and more frequent requests for good cause exceptions to EECRF caps and demand and energy goals. Cities noted that costs could rise for the residential class as well if the utility is forced to compensate for the decrease of participants in the program by including additional expensive residential programs to meet its goals. Sierra Club opined that allowing entities to opt-out will decrease funds available for energy efficiency programs and decrease the opportunities for utilities to achieve their goals.

TIEC disagreed with Cities' claim that allowing industrial customers to opt-out would reduce the applicable size of the commercial class in half and noted that Cities' provided no support for this contention. They explained that proposed subsection (w) addresses these concerns by providing that the utility's demand goal be adjusted to remove load that is lost as a result of an opt-out. Joint Utilities acknowledged that there is considerable confusion surrounding how many customers could eventually opt-out of the program. They expect, however, that the policy will diminish the opportunities available to utilities to achieve energy efficiency savings and is, therefore, at odds with an objective to maximize the potential for energy efficiency savings across the state.

EDF and Joint Utilities opined that allowing certain customers to opt-out of the program shifts the cost of producing net benefits to other customers. EDF, Joint Utilities, and CLEAResult agreed that the net benefits achieved through the utility programs benefits all customers. Joint Utilities noted that many of the facilities that would be eligible to opt-out have historically participated in energy efficiency programs and if allowed to leave would enjoy the benefit of the incentive received without contributing to the on-going costs of the program. Pepco added that since it appears that exemption could be requested at any time, this would allow a company to receive a utility incentive for its own retrofit one year and then apply for an exemption from the program the next year. EnerNOC remarked that customers should not be given the opportunity to opt-out of a program from which they also benefit from and doing so would be detrimental to all customers that depend on receiving reliable electric service. Pepco opined that the exemption should require a showing from the customer that there is a competitive impact outside the U.S. market, minimum scale, and no history of receiving benefits from an energy efficiency program. Furthermore, EnerNOC noted that in its final order in Project Number 37623, *Rulemaking Proceeding to Amend Energy Efficiency Rules,* the commission previously rejected a proposal that would have allowed certain customers to opt-out of energy efficiency programs.

Commission response

As explained by the commission in response to comments related to subsection (c)(11), PURA §39.905(a)(3) now specifically limits a utility's energy efficiency programs to residential and commercial customers. Although some rate classes may include only a particular type of customer, a particular rate class may include both industrial and commercial customers. The primary impact of the changes currently proposed by the commission under this project is to include a means of identifying industrial customers that are in rate classes that also include commercial customers. The commission proposes to now exclude those industrial customers taking service at distribution voltage, if certain requirements are met and the customers actively opt-out.

Cities and OPUC also argue that the proposed rule violates PURA §36.003 by establishing discriminatory rates. PURA §36.003 prohibits unreasonably discriminatory rates. Not applying the EECRF to industrial customers in a particular class is not unreasonably discriminatory, because this approach carries out PURA §39.905 and because industrial customers that are not subject to the EECRF are not eligible for the energy efficiency programs that the EECRF funds.

Several parties noted the difficulty of interpreting eligibility for exemption under the provisions of the Tax Code. The commission believes that the current proposal is much more effective in this respect than similar provisions proposed by TIEC during Project Number 33487. Under the current definition of eligible customer adopted in subsection (c)(30) and the identification notice provision in subsection (w), it is now the industrial customer's burden to determine exemption eligibility and submit relevant opt-out information to the utility, including a description of its industrial processes and a copy of the customer's Texas Sales and Use Tax Exemption Certificate. The commission believes that placing the burden on industrial customers in this manner will also have the effect of reducing the total number of industrial customers that opt-out and minimize any resulting cost-shifting to the remaining customers. Further, an industrial customer will not be able to participate in the energy efficiency programs for a three-year period once a utility accepts the identification notice.

During the comment period for Project Number 33487, TIEC recommended amendments to this rule to implement HB 3693 using Tax Code exemptions to define industrial customers and exempt such customers from non-applicable provisions of the rule. They proposed exemptions found in Tax Code §151.317, which exempts gas and electricity from sales tax when the gas and electricity is sold for use in certain specified industrial processes. However, the commission did not adopt TIEC's recommendations. The commission instead determined that relying on voltage level provided a simpler means of identifying industrial customers. Limiting the definition of "commercial customer" to non-residential customers taking service at distribution voltage therefore represented a simple but rough cut at the issue by excluding those entities taking service at transmission voltage.

In this project, TIEC has again proposed a finer cut at the issue that attempts to accomplish the objective of excluding all industrial customers while minimizing the practical problems associated with identifying industrial customers. The commission believes that TIEC's current recommendation can accomplish the intent of the statute without prohibitive administrative costs. The commission therefore adopts the amendments as proposed by TIEC, and will continue to monitor the implementation of this change to the rule to ensure that associated administrative costs do not outweigh the benefits of the exclusion.

The adopted amendments include the following actions: (1) retaining the definition of "commercial customer" in subsection (c)(4) to include non-residential customers taking service at distribution voltage; (2) retaining the definition of "eligible customers" in subsection (c)(11) to include residential and commercial customers, and industrial customers only to the extent they are grandfathered under certain load management program; (3) defining "industrial customer" in subsection (c)(30) as a for-profit entity engaged in an industrial process taking service at transmission voltage, or taking service at distribution voltage if it qualifies for a tax exemption under Tax Code §151.317 and has submitted an identification notice under subsection (w); (4) defining "rate class" in subsection (c)(49) to exclude non-eligible

customers; (5) limiting the allocation of the performance bonus in subsection (h)(6) to eligible customers; and (6) providing a process for industrial customers to submit the identification notice in subsection (w).

Subsection (c)(33); International performance measurement and verification protocol (IPMVP)

In the definition of international performance measurement and verification protocol, Sierra Club suggested removing the word "four" before M&V to reflect the fact that more than four approaches may be developed in the future.

Commission response

The commission acknowledges that more than four M&V approaches may be developed by the Efficiency Valuation Organization in the future and therefore agrees to remove the word four before M&V in the definition of International Performance Measurement and Verification Protocol (IPMVP), as requested by Sierra Club.

Subsection (c)(34); Lifetime energy (demand) savings

TX ROSE and TLSC suggested narrowing the definition of lifetime energy (demand) savings by replacing energy (demand) savings with net energy (demand) savings, the term lifetime with effective useful life, and deleting the last sentence that states the lifetime energy (demand) savings can be gross or net savings.

Commission response

The commission appreciates TX ROSE and TLSC's comments. The commission clarifies that the definition for lifetime energy (demand) savings was left intentionally broad to allow the EM&V contractor flexibility when evaluating specific energy efficiency projects or programs. Therefore, the commission declines to adopt TX ROSE and TLSC's requested revisions to the definition.

Subsection (c)(39); Net savings

In the definition of net savings, TX ROSE and TLSC recommended that the definition of net savings be revised to require that the total change in load that is attributable to an energy efficiency program be adjusted to account for the effects of free riders, energy efficiency standards, changes in the level of energy service, and other causes of changes in energy consumption or demand by replacing the language "may consider" with "shall be adjusted to account for." Similarly, Cities suggested the commission revise the definition of net savings to give it a clearer distinction from the related definition of gross savings. In addition, Sierra Club suggested adding the words "spillover effect" to the list of issues that may be considered when determining the net savings.

Commission response

In response to TX ROSE and TLSC's suggestion, the commission has clarified that the definition so that net savings shall include consideration of appropriate factors. The commission agrees, as suggested by Sierra Club, that it is appropriate to add "spillover effect" to the list of factors that may be considered when determining net savings. The commission also agrees with Cities' suggestion that the definition be given a clearer distinction from the definition of gross savings.

Subsection (c)(45); Peak demand reduction

CLEAResult supported the definition of peak demand reduction stating that it incorporates winter peak, as intended in SB 1125. TNMP suggested that since the definition of peak demand reduction was revised to include winter peak periods and the definition of peak period was revised to include times during the winter months of December, January, and February, the commission should affirm that utilities can use any programs, summer or winter peak demand programs, to achieve demand and energy savings that meet the utilities' total demand and energy savings goal. It opined that this is the intent of SB 1125 and the rule should be implemented to encourage the development of new energy efficiency programs that include winter programs.

Commission response

The commission agrees with CLEAResult that the definition of peak demand incorporates winter peak, as intended by SB 1125. The commission agrees with TNMP and affirms that a utility may use winter peak demand programs as well summer peak demand programs to achieve demand and energy savings towards its total demand and energy savings goals. Therefore, a utility may offer a program or measure that reduces either winter or summer demand and count that reduction towards its demand goal.

Subsection (c)(46); Peak period

In the definition of peak period, Sierra Club suggested extending the summer peak period by one hour to eight p.m. to better reflect actual peak use in the summer period.

Commission response

The commission notes that the peak period reflects the time of highest peak demand on the utility's system. According to ERCOT, the highest use period during the hottest days of summer occurs between the hours of 3 and 7 p.m. The commission, therefore, believes that the definition as proposed is appropriate and declines to adopt the suggested amendment.

Subsection (c)(48); Projected savings

Cities suggested that the definition of projected savings be revised to remove any reference to gross savings. They stated that net savings give a more accurate picture of projected savings since factors unrelated to energy efficiency programs would be removed. In addition, they stated that ratepayers should not be required to pay a performance bonus attributable to demand savings achieved from free riders or pay for programs that appear to be effective only due to the use of a gross measure.

Commission response

The commission notes that a utility's performance bonus is not based on projected savings, but rather on exceeding verified demand and energy savings goals. Projected savings are typically used by the utility for program and/or portfolio planning purposes, while the performance bonus is based on the utility's actual energy efficiency achievements for the previous program year. Prior to awarding a performance bonus, the utility's budget is trued up and reported savings are verified. Because projected savings are used for planning purposes rather than in the true-up process, the commission declines to revise the proposed definition to remove any reference to gross savings.

However, the addition of subsection (q), Evaluation, measurement, and verification (EM&V), necessitates several minor clarifications in this subsection. The commission clarifies the first sentence to note that projected savings are values reported by an electric utility prior to the time the energy efficiency activities are implemented. The second sentence is clarified to state that

projected savings are typically estimates of savings prepared for program and/or portfolio design or planning purposes.

Subsection (c)(49); Rate class

Cities approved of the proposed definition of rate class because defining rate class based on classes approved in the utility's most recent base-rate proceeding ensures uniformity across transmission and distribution utility (TDU) service territories. TNMP also supported the proposed definition of rate class but noted that some portions of the rule refer to rate class and some to customer class. Since no definitions for customer class or residential customer are included in the proposed rule, TNMP proposed adding definitions of those terms. Cities noted that TNMP does not propose removing the provision that rate classes be used to allocate EECRF, they opposed the two proposed definitions made by TNMP, arguing that they add too much confusion given the rule's mandate that costs should be allocated by rate classes, and recommended that the commission reject the additional definitions.

Commission response

The commission declines to include definitions of customer class and residential class in the rule, and notes that customer class and residential customer are defined in §25.5. Although the terms "rate class" and "customer class" have had different meanings in different contexts in the industry, the commission's use of rate class versus customer class in this rule is intentional. In the rule as adopted, "rate class" is defined because it has a specific meaning and is used for cost recovery purposes in subsections (f) and (h). In contrast, "customer class" is used in the rule for program administration purposes and has a more fluid meaning.

Subsection (c)(57); Technical reference manual (TRM)

Opower suggested that the definition be revised to include a provision for protocols for the ex-post verification of energy efficiency program savings. It opined that this will allow the commission to more closely follow the efforts of other states in developing a TRM and make clear that protocols are critical tools for measurement that will be included in the TRM.

TX ROSE and TLSC commented that the definition of TRM be revised to state the TRM is a document compiled by an EM&V contractor.

Commission response

The commission appreciates the comments of Opower and acknowledges that protocols can be critical tools for measurement. The commission agrees to make a broad inclusion for protocols in the TRM, rather than the requested provision for "protocols for the ex-post verification of energy efficiency program savings," in order to recognize that other types of protocols may also be used.

The development of a statewide TRM shall be accomplished by the commission's EM&V contractor. Therefore, the commission agrees to amend the proposed definition to acknowledge that the TRM is a document compiled by the commission's EM&V contractor.

Subsection (c)(58); Verification

TX ROSE and TLSC requested that the definition of verification be revised to add that it is an independent assessment conducted by the EM&V contractor.

Commission response

The commission notes that in addition to the activities of the EM&V contractor, verification may also be conducted by a utility or third party. Therefore, the commission declines to adopt the proposed definition as requested by TX ROSE and TLSC.

Subsection (d); Cost-effectiveness standard

Joint Utilities requested that the commission modify subsection (d) to state that while a utility's overall program portfolio must be cost-effective, individual programs do not need to comply with the cost-effectiveness standard. They stated that there is no need for all individual programs to be cost-effective and that a requirement that all programs be cost-effective will discourage the experimentation required to develop long-term, overall successful energy efficiency programs.

Commission response

The commission concludes that all programs, with the exception of the low-income program, must meet the cost-effectiveness standard in subsection (d). To assure best use of ratepayer funds, a program that does not meet the cost-effectiveness standard in the rule may need to be modified to reduce program costs or increase savings, or be discontinued. The commission, however, points to subsection (k) that provides market transformation programs some flexibility in meeting the cost-effectiveness standard during their first year of implementation. This allows utilities the flexibility to experiment with programs in order to develop more successful energy efficiency programs. In addition, the low-income programs are not required to meet the cost-effectiveness standard in the rule, but must meet standards required by the Savings-to-Investment ratio (SIR) methodology. The commission, therefore, declines to amend the rule, as suggested by Joint Utilities, to exempt individual energy efficiency programs from meeting the cost-effectiveness standard in the rule.

Subsection (d)(1)

REP Coalition and OPUC objected to the exclusion of EM&V costs allocated to a utility pursuant to the proposed subsection (q)(12)(B) (now (q)(10)(B)) from the calculation of the total cost of an energy efficiency program for the purpose of assessing a program's cost-effectiveness and requested that subsection (d)(1) be revised to include these costs. They opined that EM&V costs constitute measurement and verification costs that are specified for inclusion in the program cost calculation pursuant to subsection (d)(1). They also suggested that the exclusion of EM&V costs in the program cost calculation could result in the selective application of measurement and verification expenses under the cost-effectiveness standard in subsection (d). They opined that there is no valid reason to discriminate in the treatment of such costs, as long as the work performed by the utility, EM&V contractor, or third party legitimately constitutes measurement and verification activities. Finally, they stated that exclusion of EM&V costs from the programs cost-effectiveness calculation could increase the probability that a program would be deemed cost-effective when it is cost-effective in name only, contrary to the legislative goal in PURA §39.905(a)(3).

OPUC recommended that if the commission permits the utilities to recover rate case expenses, this cost should be listed along with other costs in the cost-effectiveness standard in subsection (d)(1). It agreed with the commission that the performance bonus be included in the cost of the program.

Joint Utilities disagreed with the REP Coalition's proposal to include EM&V costs and OPUC's suggestion to include rate case expenses in program costs when determining the cost-effective-

ness of a program. Joint Utilities did not understand how these costs would be included since these would be historical costs. They stated that these costs are of a different nature than typical program costs and should not be included in the cost-effectiveness calculation.

Commission response

The commission agrees with REP coalition and OPUC that EM&V costs constitute measurement and verification costs that are specified for inclusion in the program cost calculation pursuant to subsection (d)(1). In addition, the commission also agrees that exclusion of these costs from the program cost calculation could cause a program to appear to be cost-effective when in fact it is not. The commission does not agree with Joint Utilities that EM&V costs are historical costs that should be excluded from a program's cost calculation. The commission notes that utilities can allocate projected EM&V expenses to each program in order to determine the cost-effectiveness of a program. The commission, therefore, agrees to include EM&V costs along with other costs in the cost-effectiveness standard in subsection (d)(1).

The commission notes that because rate case expenses do not directly contribute to a reduction in demand and energy growth, these expenses are more appropriately allocated to individual rate classes rather than being allocated to specific energy efficiency programs. Therefore, the commission disagrees with OPUC that these expenses should be included in the cost-effectiveness standard in subsection (d)(1) and declines to adopt the requested change.

Subsection (d)(2)(A)

Sierra Club commented that the proposed calculation of the avoided cost of capacity is reasonable and in keeping with long-standing commitments.

Cities supported the language added to the proposed provisions for calculating the avoided cost of capacity because it references conventional combustion turbine technology as well as advanced combustion turbine technology as identified by the Energy Information Administration (EIA) and requires that the lower of the two avoided benchmarks be utilized. They claimed this was a more accurate method to determine the avoided cost of capacity since new generation developers would be expected to select the least costly technology.

Commission response

The commission appreciates the comments of Cities and Sierra Club and agrees that the proposed calculation of the avoided cost of capacity is reasonable and provides a more accurate method to determine the avoided cost of capacity by taking into account that new generation developers may select the lowest cost technology.

Subsection (d)(3)(A)

Public Citizen, SEED Coalition, and Sierra Club disagreed with the proposed method of determining the avoided cost of energy. They stated that calculating the avoided cost of energy (for the ERCOT region) by determining the load-weighted average of the competitive load zone settlement prices for the peak periods for two years is too short of a timeframe and could cause the program to vary considerably. Sierra Club justified their statement by explaining that if the previous two years happened to experience low prices, it would be difficult for utilities to justify programs as cost effective and alternately if prices were high for the previous two years, it would be too easy to justify more costly programs. Sierra Club, Public Citizen, and SEED Coalition instead suggested that the commission base the avoided cost of energy on a five-year time period to account for yearly swings in prices. They opined that a five-year weighted average would provide a more consistent calculation for utilities to base their program on as well as additional certainty in program design.

Similarly, CLEAResult opined that the proposed calculation of the avoided cost of energy will introduce additional uncertainty for energy efficiency and demand side management planning. It stated that programs offered on a multi-year basis may be subject to an annual cost-effectiveness calculation that is not produced by ERCOT until November 1st of each year, which may cause a timing issue for programs expected to be launched the following year. It recommended that the cost figure be published by October 1st of each year, and that utilities retain the option to use the avoided cost figure in existence at the time of their approved EECRFs.

EDF proposed that utilities be allowed an adjustment mechanism to the avoided cost of energy that takes into account future energy prices. It also showed concern with using the previous two years of energy prices to determine the cost-effectiveness of an energy efficiency program. It opined that the benefits of energy efficiency programs are based on savings gained versus the price of energy in the future and that using the previous two years energy prices with historically low natural gas prices could undercut the ability of utilities to offer cost-effective programs. Sierra Club recommended adding up to 10% to the avoided costs if it is anticipated that they will significantly increase in the coming year.

Public Citizen and SEED Coalition stated that since consumers are paying a retail rate, the commission should consider using an average based on the average retail cost. They opined that doing so would provide a direct comparison for determining customer impact and savings. Sierra Club also suggested that the price be based instead on an average ERCOT region retail rate to recognize the fact that energy is saved not only at the peak and that residential and commercial customers generally pay a retail rate.

Cities recommended that the commission reject comments made by Public Citizen, SEED Coalition, and Sierra Club that suggest that the commission use retail rates to determine the avoided cost of energy. Cities stated that using retail rates would result in an inaccurate calculation of the avoided cost of energy, which is determined by the actual energy (wholesale) price. Cities explained that the retail price includes transmission and distribution charges along with profit and/or billing cost incurred by the retail electric provider (REP). Using retail rates would result in bill savings, a different concept than avoided costs which is the accurate method for determining the benefits of an energy efficiency program. Cities recalled that in Project Number 33487, the commission rejected the use of transmission and distribution costs in avoided costs. They contended that the commission recognized that the primary economic benefit of energy efficiency programs is caused by reducing the demand for generation services, which appropriately includes incremental capacity and energy costs. Furthermore, they explained that using retail rates would include costs that are not part of the energy efficiency program. This, in turn, would artificially inflate program benefits and erroneously increase a utility's performance bonus.

Commission response

The commission amended the avoided cost of energy calculations in the proposed rule to take into account the transition to a nodal market in the ERCOT region. The avoided cost of energy shall now be calculated by determining the load-zone weighted average of the competitive load zone settlement point prices for the peak periods covering the two previous winter and summer peaks. The commission believes that this method will give an accurate determination of the actual wholesale cost of energy and that using two years' worth of data will account for any abnormalities such as changes in wholesale prices and weather. The commission, therefore, does not agree with Public Citizen, SEED Coalition, and Sierra Club that use of more than two years' worth of data is warranted and declines their request to base the cost of energy on a five-year time period.

With regard to CLEAResult's recommendation that the cost of energy figure be posted by October 1st of each year rather than November 1st as proposed by the commission, the commission notes that the use of load zone settlement point prices at summer and winter peaks is integral to the calculation of the cost of energy. Because the summer peak period runs through the end of September each year, it is not practical that ERCOT calculate the avoided cost of energy by October 1st. With regard to CLEAResult's suggestion that utilities retain the option to use the avoided cost figure in existence at the time of their approved EECRFs, the commission notes that the proposed rule gives the utilities time to make the needed adjustments to their energy efficiency program manuals before the new program year begins. Therefore, the commission declines to adopt CLEAResult's suggested changes.

The commission appreciates the comments of EDF that suggest that utilities should be allowed an adjustment mechanism to the avoided cost of energy that takes into account future energy prices. However, due to the numerous assumptions needed to go into a projection of future prices as well as the variety of different price projection models that could be utilized, the commission concludes that an unacceptable amount of subjectivity would be introduced into the calculation of the avoided cost of energy, and therefore declines to make EDF's proposed amendments.

In addition, the commission declines Sierra Club's request to add up to 10% to prices if it is anticipated that they will significantly increase in the coming year because, like EDF's proposal, such an addition would be too subjective.

The commission agrees with Cities and declines the request made by Public Citizen, SEED Coalition, and Sierra Club to use a cost based on the average retail rate. The commission notes that using the avoided cost of energy is appropriate because the primary economic benefit of energy efficiency programs is the reduction in demand for generation services, which include incremental capacity and energy costs. The avoided cost materializes in the wholesale generation market and is based on the sum of incremental capacity cost and wholesale energy prices. Using retail rates rather than wholesale energy prices would therefore not reflect the intent of the program to reduce demand for generation services. Retail rates include additional utility and service provider costs that are not avoided as a result of energy efficiency programs. As pointed out by Cities, basing avoided costs on retail rates would inflate program benefits and erroneously increase a utility's program bonus.

Subsection (e); Annual energy efficiency goals

Pepco expressed concern that language allowing crediting of behavioral change toward the savings goals is too sweeping and broad. It recommended language that requires that the behavioral change be the result of some enabling investment in on-premise energy monitoring or energy management system capacity. At a minimum, it suggested that savings credited to a utility for behavioral changes be limited to no more than 10% of the utility's program goal.

Opower disagreed with Pepco's comments that questioned whether a call for conservation through a behavioral program is creditable and their request for a cap on the amount of behavioral energy efficiency that can be included in a utility's portfolio. It noted that although caution is understandable, measurable and verifiable savings have been attributed to behavioral programs at scale in several states. It also noted that the statute requires that utilities be allowed to implement behavioral energy efficiency programs.

Likewise, the Joint Utilities argued that PURA §39.905(d)(16) does not require savings associated with behavioral programs to be tied to "physical improvements" or that the programs be limited to 10% of the utility's goal, as Pepco asserted.

Commission response

Pepco expressed concern that language that allows crediting of behavioral change towards the savings goals is too broad and they recommended that the language be amended to require the behavioral change to be the result of an actual investment being made. In response, the commission points out that behavioral programs differ from most energy efficiency programs, which require that an investment be made in order to determine savings. Behavioral programs are geared towards educating and motivating customers in such a way that they modify when and how much energy they consume. These programs are implemented over time through a series of interactions with customers to reinforce and encourage energy-saving behavior. The commission notes that although a recommendation may be made to replace or install energy efficient devices, the focus of the program is to encourage long-lasting energy saving behavior that may or may not involve installation of a particular energy efficiency measure. For this reason, the commission does not agree with Pepco that the proposed language be amended to require that behavioral change credited to a utility's savings goals be the result of some enabling investment in on-premises energy monitoring or energy management system capacity.

The commission also disagrees with Pepco's recommendation that a limit be placed on behavioral programs. The commission notes that SB 1125, which instructed the commission to allow utilities to implement "energy use programs with measurable and verifiable results that reduce energy consumption through behavioral changes that lead to efficient use patterns and practices," did not call for a limit on these programs. The commission, therefore, declines to adopt Pepco's suggested change.

Subsection (e)(1)

TX CHPI recommended adding language that would require a utility to administer a portfolio of energy efficiency programs in a market-neutral, non-discriminatory manner.

Commission response

The commission notes that subsection (a)(1) requires that utilities administer energy efficiency incentive programs in a market-neutral, non-discriminatory manner. Because the language

recommended by TX CHPI already exists in the rule, the commission determines that no further action is necessary.

Subsection (e)(1)(D)

OPUC agreed that language required by SB 1125 to shift the metric of energy efficiency goals from growth in demand to peak demand savings better reflects a valuable purpose for energy efficiency programs, to reduce the need for peaking generation deployment.

Commission response

The commission appreciates OPUC's comment and agrees that the demand savings goal shift to a percentage of the utility's summer weather-adjusted peak demand for the combined residential and commercial customers for the previous program year appropriately reflects the intent of SB 1125.

Subsection (e)(1)(E)

OPUC commented that if the commission permits certain customers to opt-out of the commercial class, then goals should be revised to take into account actual participation so that participants do not have a larger load to carry.

Sierra Club requested that the portion of subsection (e)(1)(E) that refers to subsection (w) be deleted as a result of their request to delete subsection (w).

Commission response

The commission makes no change in response to OPUC's comment, because subsection (w) allows a utility to revise its demand reduction goal to remove any load that is lost should an industrial customer taking service at a distribution voltage submit an identification notice that allows it to opt-out of participation in a utility's energy efficiency program.

Further, the commission declines to delete subsection (w) for the reasons specified in subsections (c)(11), (c)(30), and (w), and therefore rejects Sierra Club's request to delete subsection (e)(1)(E).

Subsection (e)(2)

OPUC, Cities, and Sierra Club stated that if a utility receives a good cause exception for any reason under subsection (e)(2), then the utility should not be eligible for a performance bonus under subsection (h) of this section. OPUC and Cities opined that a performance bonus is to promote exceptional achievement in administering energy efficiency programs and should not be given to utilities that receive exceptions to cost caps or goals. They suggested that subsection (e)(2) be modified to reflect this goal.

TX ROSE and TLSC recommended, and OPUC agreed, that clarification needs to be provided for establishing what constitutes a good cause exception to the minimum standards for goals and cost caps proposed in the rule and suggested the commission replace the proposed rule language for subsection (e)(2) with language that requires a utility to show that it cannot reasonably meet the established goals and demonstrate that its load growth, system load factor, or other exceptional factors significantly hinder the utility's ability to meet these goals. In addition, TX ROSE and TLSC requested that a utility, including a utility with self-delivered programs, be required to provide the commission with exceptional factors that prevent the utility's expenditures from remaining under cost or rate caps.

Joint Utilities are opposed to the proposal by OPUC, Cities, and Sierra Club that states that if a utility receives a good cause exception they should not be eligible for a performance bonus. Joint Utilities stated that good cause exceptions are generally granted by the commission because circumstances outside the utility's control prevent them from achieving the goal. They noted that a study commissioned by the commission in 2008, *Assessment of the Feasible and Achievable Levels of Electricity Savings from Investor Owned Utilities in Texas: 2009-2018,* found that the goals that could be realistically met by the state's utilities varied greatly depending on climate, customer mix, housing stock, and dominant type of air conditioning. They stated that to deprive a utility from the opportunity to earn a bonus under these conditions removes the incentive to implement successful energy efficiency programs and was not the Legislature's intent when adopting PURA §39.905. They opined that the directive of PURA §39.905(b)(2) was that an incentive be given to a utility that exceeds their energy efficiency goals. Finally, they stated that the best time to make a determination of whether a utility deserves a bonus is at the time the good cause exception is requested or in the EECRF proceeding where the bonus is requested.

Commission response

The commission does not agree with OPUC, Cities, and Sierra Club that if a utility receives a good-cause exception under subsection (e)(2), it should not be eligible to receive a performance bonus under subsection (h) of this section. The commission notes that performance bonuses are awarded on a case-by-case basis for utilities that have received good-cause exceptions. The purpose of a performance bonus is to reward exceptional achievement in administering energy efficiency programs and to provide an incentive to a utility to achieve successful energy efficiency programs. However, the commission also notes, as mentioned by Joint Utilities, that a good-cause exception is generally granted by the commission when circumstances outside the utility's control prevent it from meeting the requirements of the rule. Therefore, the commission will continue to award performance bonuses on a case-by-case basis for utilities that receive good-cause exceptions, and declines to make OPUC, Cities, and Sierra Club's requested change.

Further, the commission's decision to exclude OPUC, Cities, and Sierra Club's requested limitation is consistent with the commission's final order in Docket Number 39361, *Application of AEP Texas North Company to Adjust Energy Efficiency Cost Recovery Factor and Related Relief,* in which the commission adopted the portion of the proposal for decision (PFD) that awarded a performance bonus to the utility despite its request for a good-cause exception to its 2010 goal calculation pursuant to subsection (e)(3)(C), which allows a utility to request an alternative method for calculating its demand goal. *See* Docket Number 39361, Order (Dec. 15, 2011) at Finding of Fact 38. In that docket, the administrative law judge (ALJ) concluded that "[b]ecause TNC's performance met the reduction goals calculated using the alternative method approved by the commission and because TNC properly calculated its performance bonus in conformance with that method, the ALJ recommends that its proposed bonus be approved." *See* Docket Number 39361, Proposal for Decision (Nov. 3, 2011) at 20.

The commission does not wish to narrowly define the requirements for a utility, including a utility that offers self-delivered programs, to be granted a good-cause exception because a utility's reasons for the request may be specific to that particular utility.

These reasons as well as limitations experienced by a utility will be taken into account during the commission's review of the utility's request for a good-cause exception. Therefore, the commission declines to adopt the requested amendments to subsection (e)(2).

The commission further discusses the performance bonus in relation to a good-cause exception in response to comments filed regarding subsection (h).

Subsection (e)(3)(C) and (D)

Sierra Club recommended that the commission clarify the alternative method to calculate demand growth. It suggested adding language to require that a utility experiencing negative growth either meet the previous year's demand reduction goal with an additional 50% requirement or 0.4% of peak demand, whichever is higher.

Commission response

For cases where a utility is experiencing negative growth, the commission notes that the rule states that a utility's demand goal shall not be lower than its goal for a previous year unless the commission establishes a goal pursuant to subsection (e)(2). The commission believes that no further clarification is needed regarding alternative demand goal calculations. The commission also notes that if a utility is experiencing negative growth, the additional requirement suggested by Sierra Club may not be possible for the utility to achieve. Therefore, the commission declines to adopt Sierra Club's suggested changes.

Subsection (e)(3)(E)

Joint Utilities opposed the proposed rule language that would prohibit a utility from claiming savings from energy efficiency measures from settlement orders or federal grant programs. They urged that subsection (e)(3)(E) be modified to allow a utility to claim savings from energy efficiency measures unless explicitly prohibited by a commission order or settlement agreement. They claimed that the proposed language is a disincentive for utilities to engage in settlement negotiations relating to energy efficiency programs or to seek federal grant funds to fund energy efficiency programs. They also opined that the proposed language contradicts the commission's historical encouragement of parties to seek settlement of contested issues and programs that reduce costs to end-use customers. They commented that certain regulatory settlements have been entered into with the expectation that energy efficiency savings could be counted towards a utility's goals. They remained uncertain how the proposed language would affect collaborations between utilities and federal, state, and municipal agencies receiving federal grants. They noted that savings associated with measures sponsored by federal funds and utility funds are tracked separately. They suggested that if the proposed language is an attempt to prevent consumers from taking advantage of both utility programs and federal grants for particular energy efficiency projects, it is not possible for the utilities to comply with this requirement unless they are provided data pertaining to recipients of federal grant programs.

OPUC recommended that subsection (e)(3)(E) be clarified to make it clear that energy and demand savings from settlement programs and grants are not included in either meeting a utility's goals or in the performance bonus.

Commission response

The prohibition in subsection (e)(3)(E) is similar to that in subsection (h) that "[t]he bonus calculation shall not include demand or energy savings that result from programs other than programs implemented under this section." The concept behind both prohibitions is that the energy efficiency rule should provide a cohesive scheme of goals, programs, cost recovery, and performance bonuses. To the extent possible, this scheme should be kept separate from energy efficiency activities undertaken by utilities with funding from settlements, grants, or other similar sources. Depending on the specific nature of each grant, settlement, or other source, it may be very difficult to tell how such items should be allocated or should count toward the utility's goals, bonus, or indeed toward its actual recovery of costs.

The bonus issue was decided in Docket Number 36952, *Application of CenterPoint Energy Houston Electric, LLC to Defer Energy Efficiency Cost Recovery and for Approval of an Energy Efficiency Cost Recovery Factor,* in which the commission upheld an administrative law judge's decision to disallow bonus amounts requested by CenterPoint based on expenditures made pursuant to a settlement agreement. Contrary to the representations made by Joint Utilities, the commission does not find support in either the proposal for decision or the order in Docket Number 36952 for Joint Utilities' proposition that "the commission has found in the last two CenterPoint EECRF proceedings that its settlement programs were appropriately considered for purposes of meeting the statutory goals."

The commission does not intend for this rule provision to discourage settlement or the utilities from seeking grant-funding for energy efficiency activities. The commission would encourage parties settling cases to consider this provision in crafting settlement agreements that may relate to energy efficiency programs, and to the extent that particular grant funds or activities can be appropriately incorporated within the energy efficiency scheme, the affected utility may request a good-cause exception to the rule for purposes of including the grant funds and activities.

Subsection (e)(3)(F)

TX ROSE and TLSC commented that the requirement that savings achieved through programs for hard-to-reach customers be no less than 5.0% of a utility's total demand reduction goal is insufficient because one third of the population of Texas have incomes below 200% of federal poverty guidelines. They recommended, as they have previously, that the goal be raised to 40% of the utility's total demand goal for all customers.

Joint Utilities recommend that TX ROSE and TLSC's proposal that the goal for hard-to-reach be increased should be rejected. They noted that some utilities are already at or above their EECRF cost caps for the residential class. An increase in the cost of residential programs would generate more requests for good cause exceptions unless EECRF cost caps are raised.

Commission response

The commission agrees with Joint Utilities that some utilities are already at or above the EECRF cost caps for their residential customer classes. An increase in the cost of residential programs resulting from increasing the percentage of more expensive hard-to-reach programs would generate more requests for good-cause exceptions unless EECRF cost caps are raised. In addition, the commission believes that increasing the required percentage of hard-to-reach programs could serve as a disincentive for utilities to grow programs that achieve high demand and energy savings at costs much lower than for the more costly

hard-to-reach programs. Therefore, the commission declines to adopt TX ROSE and TLSC's requested amendments.

Subsection (e)(3), new subparagraph (G)

CLEAResult recommended that the commission add subsection (e)(3)(G) to clarify that utilities may claim peak savings on a per project basis towards summer or winter peak, but not both. Savings towards a utility's peak goal would be the sum of summer and winter peak reduction.

Commission response

The commission agrees with CLEAResult and adopts subsection (e)(3)(G) to clarify that a utility may claim peak savings on a per project basis towards summer or winter peak, but not both, and that savings towards a utility's peak goal is the sum of summer and winter peak reduction.

Subsection (e)(4)

Public Citizen and SEED Coalition opined that the proposed conservation load factor of 20% is set too low and suggested that utilities be required to use at least a 25% and preferably a 30% load factor that applies to the entire program and not just the minimum peak demand. They stated that this will save real energy not just peak demand and will bring overall savings to customers. They observed that as load management programs migrate over to economic programs, the utilities should find this goal easier to achieve.

Sierra Club opined that utilities should design their programs to meet a conservation load factor of 25% or 30%. It stated that the required energy savings goal only applies to the minimum peak demand and not programs once the goal is met. It suggested that the conservation load factor be applied to all energy demand reduced not just the goal in order to encourage utilities to invest in programs that reduce peak demand and lead to energy and water savings.

EDF suggested that the capacity factor be tied to peak demand achieved rather than the peak demand goal. It opined that the concept of capacity factor is to measure kWh achievement relative to kW demand achievement.

Commission response

The commission notes that a utility is required to administer a portfolio of energy efficiency programs designed to acquire at least the minimum demand and energy savings goals as defined in subsection (e). In the context of this section, the conservation load factor is used to determine a utility's energy savings goal for the year. The energy savings goal establishes the minimum energy savings a utility must acquire. Should a utility exceed its goal at a cost that does not exceed the cost caps, it will be awarded a performance bonus. The prospect of a performance bonus gives a utility the incentive to exceed its minimum goals. Further, it would be difficult to change the energy goal throughout the program year to track the utility's actual demand reduction.

The commission also notes that it previously rejected proposals to increase the conservation load factor in Project Number 37623. The commission maintains the belief that increasing the load factor would increase the cost of the programs and believes that the proposed rule balances the benefits of energy savings with the costs of the programs. The commission, therefore, declines to adopt the amendments to the proposed conservation load factor as requested by Public Citizen, SEED Coalition, Sierra Club, and EDF.

Subsection (e)(5)(C)

RECA and Joint Utilities agreed with the commission's proposed language in subsection (e)(5)(C). RECA explained that the benefit of this language is that it ensures that standard offer, market transformation, and self-delivered programs aimed at promoting early adoption, implementation, and enforcement of building codes are not categorically deemed ineligible simply because the energy codes may be mandatory by law.

OPUC commented that it was not clear whether this proposed provision would allow a utility to pay an incentive to a builder to enable the builder to comply with new building codes or whether the utilities would pay a local government to enforce a new building code. It found both scenarios objectionable. OPUC and Cities stated that builders should not be paid for complying with the law and that the utilities should not use ratepayer money to fund local government to enforce new codes. Cities opined that using ratepayer funds for these types of measures contributes to the free ridership problem. Although Cities acknowledged that the proposed language is tailored only to the degree energy codes do not achieve full compliance rates, Cities feared that it may be impossible to determine whether codes achieve full compliance. OPUC recommended that subsection (e)(5)(C) be struck in its entirety.

Joint Utilities disagreed with OPUC and asserted that subsection (e)(5)(C) should be adopted. They believed that energy savings may be achieved by encouraging compliance with building energy codes. They found it appropriate that an EM&V contractor would have the latitude to consider code enforcement when developing the TRM and when estimating savings achieved through a program.

RECA disagreed with the concerns of OPUC and Cities. It stated that it is widely known that compliance rates for mandatory energy codes fall well below 100% and when full compliance is not achieved, substantial energy and peak savings are lost. It commented that the proposed rule will allow for the development, review, and possible implementation of programs proposed by utilities. It suggested that efforts to improve compliance and enforcement of energy codes could take many forms, including the use of third-party enforcement solutions such as using home energy raters to check compliance.

RECA remarked that the proposed language in subsection (e)(5)(E) could help bridge the multi-year gap between the publication of new energy codes and statewide adoption and enforcement of these codes by promoting early adoption and jump-starting compliance. It noted that the 2009 International Energy Conservation Code (IECC) did not become effective in Texas for single-family homes until April 1, 2011 and the International Residential Code (IRC) did not become effective until January 1, 2012. It explained that during these "gap" years, hundreds of thousands of new homes are built according to an older version of the code and thus forfeit substantial energy and demand savings over the life of the homes. A study by the Energy Systems Lab at Texas A&M University found that energy savings as a result of the 2009 IECC ranged from 8.3 to 14.6%, as compared to the previous version of the code. The 2012 IECC and IRC have been available since early 2012 but Texas is only in the preliminary stages of considering the codes for adoption. Texas A&M found that the energy savings resulting from these codes range from 14 to 25% for residential construction on top of savings already achieved in the 2009 codes. Peak demand savings of 14 to 26% are estimated for the summer months and 29 to 40% savings in winter months.

RECA noted that these savings will not be fully realized until the state first adopts the code and the building industry and jurisdictions receive the training and education necessary to implement, comply with, and enforce the codes. It noted that the timetable for this process varies and could take up to several years.

RECA commented that the rule should permit a baseline for early adoption that gives credit for jurisdictions that either adopt the statewide energy code earlier than required or adopt a future edition of the national model energy code before the state has completed the code adoption process. In addition, RECA and Joint Utilities requested that the baseline for incentives and market transformation programs that target new buildings consider the actual compliance rate of code implementation and enforcement statewide and that programs be measured against actual or estimated compliance levels with existing building codes, not against an assumed 100% compliance.

Commission response

The commission agrees with RECA's comments that subsection (e)(5)(C) provides that standard offer, market transformation, and self-delivered programs aimed at promoting early adoption and increased adoption, implementation, and enforcement of building codes, to the extent that such enforcement does achieve full compliance rates, are not categorically deemed ineligible because the energy codes are required by law, or in the case of early adoption, may soon be required by law. The commission also agrees with Joint Utilities that the EM&V contractor should have the latitude to consider code enforcement when developing the TRM and when estimating savings achieved by a particular program. As noted by RECA, energy code compliance rates fall well below 100%. Therefore, the commission does not agree with Cities that encouraging compliance contributes to the free ridership problem or share their concerns that it may be impossible to determine whether codes achieve full compliance. To the extent that compliance typically falls below 100%, savings that result from promoting greater compliance contributes appropriately to the demand and energy goals of a utility. The commission agrees with RECA that when full compliance is not achieved, substantial demand and energy savings are lost. RECA also provided evidence that a multi-year gap exists between publication of new energy codes and statewide adoption and enforcement of codes. Likewise, the commission agrees that encouraging early adoption can result in substantial demand and energy savings.

In response to Cities and OPUC's concern that builders should not be paid to comply with energy codes and ratepayer money should not be used to fund enforcement of new codes, the commission agrees with RECA that efforts to improve compliance and enforcement of energy codes can take a variety of forms, including the use of third-party enforcement solutions. With regard to RECA and Joint Utilities' request regarding baselines, the commission notes that the proposed definition of baseline is consistent with their request.

Thus, the commission does not agree with OPUC that subsection (e)(5)(C) should be struck from the rule and therefore declines to make the change.

Subsection (e)(5)(E)

Sierra Club supported permitting utilities to provide a self-delivered program in rural areas but suggested that they be allowed to do so without a contested case hearing. It suggested that the utilities be required only to demonstrate that their goal could not be met without the provision unless a contested case hearing was requested by either energy service providers or retail electric providers.

Commission response

The commission notes that PURA §39.905(i) specifically requires a contested case hearing in order for a utility to demonstrate that the requirements of PURA §39.905(a) cannot be met in a rural area through retail electric providers or energy service providers but can be met by providing a self-delivered program. Therefore, the commission declines to adopt Sierra Club's requested change.

Subsection (f); Cost recovery

Proposed Subsection (f)(1); adopted subsection (f)(2)

OPUC stated that PURA §39.905 is based on customer classes and does not mention rate classes, and therefore believes that utilities should not be precluded from assigning costs based on customer class. It recommended deleting subsection (f)(1).

Cities disagreed with parties such as OPUC who recommended changes to remove the EECRF cost assignment by rate class established in the applicable utility's last base rate case. They stated that, in designing the EECRF tariff, the foremost principles should be the utilization of the rate classes approved in the utility's most recent base rate proceeding. They noted that, during the process of setting unbundled TDU rates, the commission established generic rate classes as a policy of promoting uniformity. Any modification of rate classes as part of an EECRF, they stated should only be an exception based on unusual circumstances, because proposals to merge or create new classes for EECRF proceedings can be used to circumvent the cost caps set out in the proposed rule.

Commission response

The commission declines to adopt OPUC's recommendation and agrees with the comments of Cities. In the commission's Order in Docket Number 39359, *Application of Southwestern Electric Power Company to Adjust Energy Efficiency Cost Recovery Factor and Related Relief,* the commission found that "a customer class can be defined as an EECRF rate class." Further, the commission believes that direct assignment of costs to rate classes ensures adherence to PURA §39.905(b)(4), while alternative allocations may not. This language is also consistent with the commission's decision in Docket Numbers 39359, 39360, and 39361, which were the respective applications of SWEPCO, AEP TCC, and AEP TNC to adjust their 2012 EECRFs.

The term "customer class" does not have a well-established meaning. For example, Order No. 40 at page 4 issued in Docket Number 22344, *Generic Issues Associated with Applications for Approval of Unbundled Cost of Service Rate Pursuant to PURA Section 39.201 and Public Utility Commission SUBST. R. 25.344,* established "six customer classes" as Residential, Secondary less than 10 kW or kVa (less than 5 kW for TNMP and EGSI), Secondary greater than 10 kW or kVa (greater than 5 kW for TNMP and EGSI), Primary, Transmission, and Lighting. The commission agreed that cost causation was a "significant factor in developing a uniform customer class configuration" and adopted these six "customer classes." However, those classes have been more commonly referred to as rate classes rather than customer classes in recent discussions of energy efficiency programs. As discussed in relation to subsection (c)(49), the commission has defined "rate class" for purposes of this rule

to be clear about what the commission intends when using this term.

Public Citizen and SEED Coalition commented that a utility should choose how to categorize its customers, noting that some classes may only contain one or two customers, in which one customer may have already participated, leaving the other customer to provide its own incentive and a portion of the utility's overhead. Similarly, Joint Utilities argued that, in a rate class with a small number of customers, the customers would be forced out of participating in energy efficiency programs. They stated that inequity issues are created when there are few customers in a rate class and recommended spreading the cost amongst a larger number of customers to mitigate that impact and correct the inequity. They recommended, if the commission believes that assigning costs at the rate class level is appropriate, modifying subsection (f)(1) to permit a utility to combine a rate class with a small number of customers with another similar rate class for the purpose of assigning costs and designing an EECRF.

City of El Paso commented that Joint Utilities' argument would charge customers in some rate classes for the benefits received by customers in other rate classes. It asserted that, even in the example of a rate class with one customer, there must have been a valid reason for the establishment of a rate class with a single customer. It observed that, while a "customer class" allocation mitigates the cost to the single customer, it spreads that cost to other rate classes, though it benefited that customer, and does not track the costs with the benefits received.

Commission response

The commission wishes to clarify that the relevant language in the proposed rule does not directly assign costs to those customers who benefit, but to those *rate classes* that have customers that receive services under the program. In the example given by Public Citizen and SEED Coalition, the commission expects that the energy efficiency measures provided to the customer by the utility, per PURA §39.905(a)(3)'s requirement that utilities provide "cost-effective energy efficiency," will produce benefits in terms of dollar savings greater than the costs; therefore, even though some utilities have some rate classes with few customers, this should not discourage participation, as participating customers will receive savings in excess of the cost. Further, as a practical matter, the issue of rate classes with few customers by definition affects a small number of customers, who are the exception rather than the norm.

In response to the comments made by Joint Utilities, the commission notes that direct assignment of costs to rate classes in no way "forces" customers in small rate classes out of participating in programs; such customers remain free to participate in programs. However, to address Joint Utilities' concerns about EECRFs charged to rate classes with a small number of customers, the commission modifies adopted subsection (f)(2) to permit a utility to request a good cause exception allowing for the combination of one or more rate classes that contain fewer than 20 customers with a similar rate class that receives services under the same programs. The commission appreciates the comments of City of El Paso, but modifies and adopts Joint Utilities' proposal. The commission believes that allowing the utilities to apply for a good cause to combine small rate classes receiving services under the same energy efficiency programs should mitigate any inequities that arise from subsidization of one rate class by another. In addition, parties participating in an EECRF proceeding will be able to review and respond to such requests for good cause exceptions.

Joint Utilities asserted that energy efficiency is a resource that provides benefits to all customer classes; therefore, the utilities should be allowed to recover the costs of those resources from all customer classes. They stated that the principles of cost causation do not apply to energy efficiency due to the system-wide benefits of the programs, which was the basis of the Legislature's goal to offer energy efficiency to all customers in all customer classes. They stated that if there are system-wide benefits created by the programs, at least some of the costs should be equitably shared by all end-use customers, consistent with generally-accepted ratemaking principles. Similarly, Public Citizen and SEED Coalition stated that utilities may upgrade a substation or add additional transmission that will benefit a small group of customers yet all customers are charged accordingly.

EDF commented that there was no legislative direction provided to make this change, and that such change does not exist in the relevant statute. It asserted that PURA uses "customer class" because it benefits all customers while benefiting participants more, and that a "rate class" allocation risks stranding funds and is less efficient for utilities running programs.

Cities supported the definition of rate class as proposed in the rule. They stated that they oppose the creation of new EECRF classes, suggesting this would circumvent the commission's goal to promote rate uniformity through establishment of generic rate classes.

Commission response

Because the rule establishes a cost cap on the *aggregate* commercial class, no funds will be "stranded" in a rate class, as EDF argues; a utility may allocate program funds to customers participating in an energy efficiency program regardless of how much of the funds are allocated to customers in a particular rate class. The commission agrees with Cities' suggestion that adhering to the generic TDU utility rate classes for the purposes of calculating an EECRF promotes rate class uniformity, which benefits the competitive retail market by allowing REPs to more easily price and market their offerings throughout the various TDU service areas.

In response to comments by Joint Utilities that energy efficiency provides system-wide benefits, the commission generally directly assigns and allocates costs based on cost causation, not receipt of benefits. As in the example provided by Public Citizen and SEED Coalition, substations and transmission lines are network elements, and typically serve customers in multiple classes. While directly assigning costs is generally preferred, because it is frequently impossible to directly assign the cost of a substation upgrade or transmission investment, those costs are typically allocated to classes based on cost causation principles, not based on the benefits that a particular class receives from the upgrade or investment. Furthermore, PURA §39.905(b)(4) prohibits recovery of energy efficiency costs from non-participating classes, which would prohibit a true benefits-based allocation of costs. Direct assignment of actual energy efficiency expenditures to the classes that received the incentives associated with those expenditures is consistent with the principle of cost causation. As with the example above concerning allocating substation and transmission lines to classes based on cost causation principles, not all energy efficiency costs can be directly assigned. The commission has therefore clarified adopted subsection (f)(2) to state that EECRF

costs shall be directly assigned to each rate class that receives services under the programs to the maximum extent reasonably possible.

The commission believes that, as a matter of policy, direct assignment of actual energy efficiency expenditures to the rate classes established in the utility's most recent base rate proceeding is appropriate, because a broader allocation methodology would result in some rate classes subsidizing programs for other rate classes. Those rate classes providing subsidies to other rate classes would be allocated a larger share of the utility's cost of service in the next base rate proceeding, because the load and energy usage of the subsidized classes would decline or grow at a lesser rate as a result of the energy efficiency programs. As a result, the customers in the rate classes with fewer suitable programs would be doubly harmed, because they would subsidize the other rate classes for the cost of the energy efficiency programs and would receive a greater portion of the utility's cost of service in the next base rate proceeding.

Joint Utilities stated that rate class assignment will result in volatile EECRF rates, depending upon participation in the previous year.

Commission response

The commission believes that the goal of assigning costs based on cost causation generally outweighs any concern over EECRF rate volatility. However, as discussed previously, the commission revises subsection (f)(2) to permit a utility to request a good cause exception, allowing for the combination of one or more rate classes, each containing fewer than 20 customers, with a similar rate class that receives services under the same energy efficiency programs. This revision addresses concerns regarding rate volatility for classes with a small number of customers while mitigating the impact of inter-class subsidization.

Joint Utilities recommended granting utilities the latitude to assign costs and set EECRFs on a customer class basis, a rate class basis, or some combination of the two, depending on each utility's circumstance. Sierra Club similarly commented that it recommends removing references to rate class. CLEAResult and Sierra Club also recommended at least permitting, but not requiring, utilities to collect fees, and track and report program costs by either customer or rate class. Sierra Club stated that some utilities prefer to charge rate classes separately; other utilities would like the flexibility to spread the costs amongst rate classes and collect by customer class. CLEAResult, EDF, Public Citizen, SEED Coalition, Sierra Club, and Texas Citizens commented that tracking and applying EECRFs to rate classes rather than customer classes is a significant administrative burden that will divert costs away from energy-saving projects to administrative functions.

Commission response

For the reasons stated previously, the commission has concluded that energy efficiency costs should be directly assigned to rate classes. Based on the experience of utilities that have already directly assigned energy efficiency costs to rate classes, the commission concludes that the administrative costs of doing so are relatively small.

EnerNOC stated that the smaller the subset of customers from which the commission requires utilities to charge and collect energy efficiency fees, the smaller the subset of customers that may participate in the utility energy efficiency program based on the available funds allocated to them. It asserted that it is possible that a smaller subset of customers may eliminate the potential for well-qualified customers to participate in a utility's load management program, because the funds available for that subset of customers may already be exhausted. It agreed with EDF, Joint Utilities, and Sierra Club's recommendation that the commission continue to allow utilities the flexibility to charge and collect energy efficiency fees by customer class or rate class.

Public Citizen and SEED Coalition commented that the rule states that the program must be cost-effective and show that all customers derive benefits, not just those that participate in a particular program within the program year.

EDF stated that when utilities evaluate programs based on rate class instead of customer class, their budgets and savings achieved decreased. It recommended that utilities be given the flexibility to decide whether to charge and collect by rate or customer class, but should the commission retain the proposed language, it suggested that the cost caps apply to the entire customer class and not to an individual rate class.

Commission response

The commission notes that it is not instituting a rate class cap for each commercial rate class, and that the utility has the flexibility, in the course of a program year, to shift funds among commercial rate classes as those rate classes receive services from those programs, provided that, *on the aggregate* for commercial rate classes, the resulting rates are not designed to recover more than the overall commercial cost cap. Then, in the subsequent true-up year, the classes that actually received incentives will be directly assigned the costs of those incentives. The commission emphasizes the importance of rate classes paying for programs from which they actually received services, and that this does not restrict the ability of utilities to provide funds to any appropriate rate classes in the course of a program year. The proposed rule already clarifies this at subsection (f)(7)(C), stating that the rates for the commercial rate classes must be set such that the resulting total commercial revenue recovery is below the cap amount calculated by multiplying the cap rate by the aggregate of all eligible commercial customers' kWh consumption.

For clarification, the language previously included under subsection (f)(2) has been moved to subsection (f)(1) and subsequent paragraphs have been renumbered.

Proposed subsection (f)(2); adopted subsection (f)(1)

TX ROSE and TLSC recommended that "may" be used instead of "shall" in subsection (f)(2) to more accurately reflect ratemaking under PURA. They also proposed language to clarify that the EECRF proceeding costs are "rate case expenses". They also proposed language to ensure that only actual costs determined by commission to be reasonable and necessary to reduce demand and energy growth were prudently incurred are included in the EECRF. They commented that in subsection (f)(2)(A) the term "actual" as a modifier to costs in the calculation of the under- or over-recovery of the EECRF costs is vague, and that the costs used in the calculation should be consistent with ratemaking principles, which are costs that were reasonable and necessary to reduce demand and energy growth and were prudently incurred. TX ROSE and TLSC provided language that would amend the proposed subsection to this effect. They also recommended deleting subsection (f)(4) as it appears to be duplicative to previous subsection (f)(2).

Commission response

The commission declines to adopt TX ROSE and TLSC's recommendations to change "shall" to "may;" in adopted subsection (f), once energy efficiency costs are removed from base rates, the EECRF is intended to be the exclusive means for recovering energy efficiency costs, and the use of "shall" reflects this intention. Subsection (f)(12) addresses the standards for cost recovery, and the commission therefore declines to adopt TX ROSE and TLSC's proposed language in that regard. The use of "actual" in subsection (f)(2)(A) indicates that the costs referred to are actual costs instead of forecasted costs. EECRF proceedings are ratemaking proceedings, and the proposed rule allows recovery of utility and municipal costs for those proceedings. Use of "rate case expenses" in the rule provisions addressing EECRF proceedings is unnecessary and would be awkward. To provide clarification, the commission has reorganized subsection (f) so that proposed subsection (f)(2) is clarified and made to be adopted subsection (f)(1). The commission deletes proposed subsections (f)(2), (f)(4), and portions of subsection (f)(6) and (7) as this language, now inclusive of OPUC's modified load growth language (discussed below), is reflected in adopted subsection (f)(1).

Subsection (f)(2)(A)

OPUC recommended clarifying language to ensure that load growth is accounted for when setting the EECRF rates for utilities that collect energy efficiency costs in base rates. It stated that if load growth is not accounted for, the utility may over-earn if more kWhs were sold than when base rates were set. It proposed language to this effect under subsection (f)(2)(A).

Commission response

The commission agrees with the comments provided by OPUC and adopts language in subsection (f)(2), with modifications, to state that the EECRF will recover costs in excess of "the amount of energy efficiency costs expressly included in base rates, adjusted to account for changes in billing determinants from the test year billing determinants used to set rates in the last base rate proceeding." The amount of energy efficiency costs expressly included in the calculation of base rates will be adjusted to account for changes in billing determinants from those used to set base rates to the actual billing determinants used to collect revenues. This adjustment will account for changes stemming from sources such as energy sales, load, and weather to determine the actual energy efficiency revenues recovered by the utility in its base rates.

The commission now accounts for load growth in the Distribution Cost Recovery Factor (DCRF) rule, and PURA §39.905(b-1) states that the EECRF may not result in any over-recovery of costs but may be adjusted each year to change rates to enable utilities to match revenues against energy efficiency costs and any incentives to which they are granted. Therefore, load growth adjustment language in the rule is appropriate until all utilities collect energy efficiency costs solely through the EECRF.

Proposed subsection (f)(2)(B); adopted subsection (f)(3)

Cities recommended edits to proposed subsection (f)(2)(B). They asserted that the proposed rule would require municipalities to wait until the subsequent EECRF case to support their expenses. They stated that the timing of the reimbursement of the municipalities' expenses is unclear, as the rule envisions utilities quantifying rate case expenses for the last case for which it has yet to reimburse cities. They stated that they are not regulated utilities, but rather regulatory authorities under PURA and are authorized to recover rate case expenses incurred from participating in ratemaking proceedings. They suggested that the commission consider permitting for the recovery of estimated rate case expenses, as the utility is permitted to seek projected energy efficiency costs in the course of an EECRF proceeding. Should the commission not wish to revisit its prior decision regarding estimated rate case expenses, Cities urged the commission to allow municipalities to quantify their rate case expenses in their direct case, provide an update at some later point prior to the decision in the case, and be able to prove the reasonableness of any remaining expenses in the utility's next EECRF case. They provided language modifying subsection (f)(2)(B) to this effect, which they asserted was consistent with commission precedent finding that EECRF proceedings are ratemaking proceedings and that municipal rate case expenses from EECRF proceedings are reimbursable.

Commission response

The commission has added rule language to expressly state that a proceeding conducted pursuant to subsection (f) is a ratemaking proceeding for purposes of PURA §33.023. PURA §33.023(b) does not expressly contemplate payment of estimated rate case expenses. Furthermore, EECRF proceedings are conducted annually and therefore should be streamlined to the extent possible. Considering all municipal expenses for an EECRF proceeding in the subsequent proceeding is an administratively efficient means of addressing those expenses. Proposed subsection (f)(2)(B) is subsection (f)(3) in the adopted rule.

Proposed subsection (f)(5); adopted subsection (f)(8)

Cities supported subsection (f)(5), which establishes EECRFs as ratemaking proceedings for the purposes of PURA §33.023, asserting that the EECRFs clearly fall within the definition of "rate" in PURA §11.003(16)(A), making them ratemaking proceedings subject to municipal intervention and reimbursement.

Commission response

The commission appreciates Cities' comments and retains the proposed language. The commission also re-designates subsection (f)(5) as subsection (f)(8) to provide information on the effective date of the EECRFs prior to the discussion of the procedural schedule.

Proposed subsection (f)(7); adopted subsection (f)(6)

Some of the parties, including City of El Paso, Joint Utilities, OPUC, Public Citizen, SEED Coalition, Sierra Club, and Texas Citizens, stated that the utilities should retain the flexibility to assess the EECRF on an energy or customer charge basis. Public Citizen and SEED Coalition asserted that this subsection is too restrictive and that the utility should determine the method that best fits its existing systems. They stated further that this change could require extensive modifications to the utilities' billing systems and add excess costs without any benefit. Joint Utilities, Sierra Club, and Texas Citizens agreed that the utilities needed flexibility to recover costs on either basis, though Joint Utilities and Sierra Club argued that an appropriate approach can be determined in the utility's EECRF proceeding. Joint Utilities stated that permitting utilities the option of either rate design approach will minimize disruptions. City of El Paso agreed with Joint Utilities that the option to charge residential customers on energy usage should be available.

City of El Paso argued that cost recovery for residential customers should not be limited to a customer charge, as there is no theoretical difference in the nature of cost recovery of energy effi-

ciency expenditures, and that the cost effect could be staggering on residential customers with low usage. It recommended that the commission allow recovery of the EECRF for residential customers through either a customer or energy charge.

OPUC opposed requiring TDUs to use a monthly customer charge. It argued that a customer charge is regressive, runs contrary to the goal of encouraging reduced energy consumption, and that it would negate some inducement for customer participation in these programs. It proposed language permitting utilities to charge either an energy or customer charge and to clarify that load growth will be accounted for in the EECRFs.

In reply comments, TNMP joined with City of El Paso, Joint Utilities, OPUC, and Sierra Club that utilities should have the option of recovering program costs from commercial customers through either an energy or customer charge. TNMP disagreed with Cities' proposal that only energy or volumetric charges be used to recover program costs from consumers. It stated that the intent of the statute is to reduce peak demand growth and utilities are required to administer energy efficiency programs designed to achieve a reduction in demand during the peak period; the EECRF is designed to satisfy the goals prescribed. It stated that, while utilities are required to implement energy efficiency programs so that all customers are eligible to participate, not every customer can because of limited utility funds; therefore, all customers should be equally responsible for these costs by amortizing the costs across the entire class.

In reply comments, Joint Utilities noted that comments in support of both energy charges and customer charges have merit, and that utilities should continue to have the latitude to recover these costs using either method for both residential and commercial customers. Similarly, CLEAResult recommended in reply comments that utilities have the flexibility to recover costs on a per-customer or per-kWh basis.

Cities, TX ROSE, and TLSC supported the assessment of an energy charge. Cities recommended that the EECRF be collected as an energy charge for both commercial and residential customers. They asserted that an energy charge is appropriate for residential customers as well as commercial customers, as it encourages energy efficiency and discourages cost shifting to low usage customers within the residential class. They argued that higher than average consumers can achieve greater potential bill savings because they use more power than other consumers, who may have little ability to effectively participate in the energy efficiency programs.

Cities further asserted that an energy charge facilitates a rate class cap, based on a kWh usage to produce a uniform and equitable rate cap in the state, since the same per kWh cap is applicable to end users. They noted that a fixed cap per customer does not recognize the variation in annual usage among utilities.

TX ROSE and TLSC supported an energy charge for residential customers, arguing that a fixed customer charge discourages energy conservation, and an energy charge more fairly distributes the costs within the residential customer class with those residential customers using the most energy paying their fair share of the energy efficiency costs. They further asserted that low-use customers are disproportionately impacted by a fixed charge.

TIEC, TNMP, and Walmart recommended that the commission maintain a customer charge. TNMP stated that a utility should be permitted the option of recovering program costs from commercial customers through a customer charge. It noted that, in its own example, some customers' bills would increase to nearly $135 per month. It stated that, since not all commercial customers can participate because of limited program budgets and because rates are not developed to pass the cost of energy efficiency to those customers that actually benefit from TNMP programs, the commission should allow a per-customer charge, so that customers are only paying their fair share of the costs of the programs.

Cities asserted that TNMP's interpretation of the commission rules presents another reason why the commission should reject the use of a customer charge. They observed that TNMP is the only utility that asserts that the rule does not impose a cap on commercial EECRF charges if the EECRF is charged on a per-customer basis. They recommended that the commission reject a customer charge to avoid TNMP's interpretation.

Walmart stated that setting an energy charge for commercial customers should be rejected. It commented that the proposed rule provides for a hard cost cap on the total EECRF that may be assessed on residential customers per month, but not commercial customers, asserting that the result is effectively no cap on a volumetric charge for commercial customers. It stated that the proposed rule disproportionately impacts larger customers as the change would result in an exponential increase in EECRF charges to certain customers, regardless of the commercial customer facility's level of energy efficiency relative to smaller customers whose EECRF assessment is less.

In reply comments, Walmart agreed with commenters that, at the very least, no change should be made to the existing language allowing the EECRF to be charged on either an energy or customer charge basis. It reasserted that requiring an energy charge for commercial and a customer charge for residential is inequitable, and that commercial customers should be optimally charged on a per-customer basis, though at the least, the commission should not modify the existing rule without exploring the collection of the EECRF on a demand basis.

TIEC urged the commission to reject proposals from Cities and OPUC to impose all EECRF charges on an energy basis. They argued that the Legislature did not adopt an energy efficiency mandate to be a tax on energy to discourage consumption, and that the cost of energy alone is sufficient to encourage customers to limit their consumption to the extent that they are able. They stated that the Legislature adopted a mandate for utilities to offer energy efficiency programs to eligible customers in order to provide programs that help customers achieve additional demand reductions. They reiterated their argument that the costs of these programs are derived from the cost of making a particular program available to customers, and are therefore determined by the number of customers to whom the program is offered. They noted that program costs have nothing to do with how much energy a particular customer uses, offering as an example, the costs of providing weather-stripping to a customer, which are not related to the amount of energy that customer consumes. They stated that cost causation dictates that the EECRF charges should be imposed on a customer basis, just as those costs are incurred. They asserted that disproportionately burdening high-load-factor customers, who already have the greatest incentive to reduce their energy usage, with EECRF costs is unjustified. Additionally, they stated that a per-customer charge is simpler and more accurate, and easier for utilities to administer. They further added that PURA §39.905(a) provides that energy efficiency programs should be designed to achieve a reduction in growth in demand, and therefore, costs should not be

collected on an energy basis when the savings are measured on a demand basis.

In reply comments to TIEC, Cities noted that a customer cost cap would be impossible to implement. They noted that rate caps on a per kWh basis are designed to uniformly impose a cost cap for commercial customers, despite the diversity in customer size and class. They challenged TIEC's argument that cost causation is the number of customers seeking access to the programs. They asserted that a utility's energy efficiency costs are caused by the costs of implementing programs designed to achieve specific goals, based on the reduction of both energy use and demand use; therefore, energy usage, by rule, is an explicit cost causative factor. They noted that a fixed customer charge is not sensitive to either energy or demand usage. They stated that the development and design of the energy efficiency program is affected by energy usage; high energy use is associated with higher program costs. They noted that the budget available for a program may be a more significant limiting factor than the number of customers seeking access to the program, and that the available budget will be indirectly affected by participants' energy use. They stated that cost causation does not dictate the use of a customer charge, and that an energy charge is preferable.

Cities also recommended rejecting the approach asserted by commenters such as Sierra Club, TIEC, TNMP, and Walmart that the EECRF be collected as a customer charge, because customer charges do not send appropriate price signals for customers to conserve energy. Cities asserted that energy charges encourage energy conservation because the customer pays more as their electric use rises.

City of El Paso disagreed with TIEC's reference to PURA §39.905(a), arguing that subsection (a)(2) references the opportunity to achieve savings in energy consumption as well as winter and summer peak demand. It disagreed that there was any valid basis in the statute to only permit the EECRF on a customer basis.

If the commission rejects proposals to assess an energy charge, TIEC and Walmart recommended the examination of a demand charge, in lieu of an energy charge. Walmart stated that charging customers on an energy charge basis is inconsistent as the goals are stated in terms of reductions in demand, not energy. Should the commission refuse to adopt a per-customer EECRF charge for commercial customers, it recommended that the commission explore assessing a demand-based EECRF charge on commercial customers billed on demand.

In reply comments, TIEC asserted that a demand charge is more appropriate than an energy charge if the commission does not allow a customer charge to be used. They stated that if the commission seeks to use the EECRF charge as a usage deterrent that will compel customers to meet energy efficiency goals, the charge would need to be imposed on a demand basis in order to track statutory requirements. They noted that an energy-based charge does not track either cost causation or the statutory energy efficiency goals and should be rejected. They recommended the adoption of a customer charge for all customer classes or alternatively a demand charge; at a minimum, they stated that utilities should retain the discretion to impose the EECRF charges and caps on a customer or demand basis, as requested in initial comments. If the commission were to determine that energy efficiency costs should not be collected on a per-customer basis, they asserted instead that costs should be collected on a demand basis for those non-residential customers currently billed on a demand basis. They commented that this would be more appropriate, as energy efficiency goals are reductions to peak demand, and costs were historically allocated on a demand basis when they were collected in base rates.

In reply comments, Cities asserted that a demand charge is impractical, as it can only be imposed on customers that have demand meters. They noted that customers in the less than 10 kW class are not required to have demand meters and are billed on a per-kWh basis and some customers in the greater than 10 kW are exempted from demand charges. Cities noted that Walmart did not state whether the EECRF demand charge would be subject to a ratchet like other distribution demand charges, but if it is, such a proposal adds another layer of inequity and customer confusion. They argued that a ratchet creates unfair situations for certain types of users such as churches, schools, ball parks, and other extreme seasonal or off-peak demand users. They noted that the Legislature has responded to the complaints of small business customers to exempt low load factor customers from ratchets. To the extent that the commission does implement a demand charge for the EECRF, they advised that a ratchet not be used for these reasons.

Commission response

The commission appreciates the comments of Cities, City of El Paso, Joint Utilities, OPUC, Public Citizen, SEED Coalition, Sierra Club, Texas Citizens, TIEC, TNMP, and Walmart. As noted by Cities, TX ROSE, and TLSC, a customer charge fails to provide a rate incentive that aligns with the policy goal of encouraging energy efficiency, and therefore an energy (volumetric) charge is appropriate for the EECRF.

The commission agrees with Cities, OPUC, TX ROSE, and TLSC that the rule should mitigate the rate impact of the EECRF on low-income and low-usage residential customers whose ability and incentive to participate in programs may be somewhat limited compared to high-usage residential customers. The commission therefore permits utilities to charge residential customers only on an energy basis.

With respect to a demand charge for commercial customers, the commission agrees with TIEC and Walmart that the statute does address demand goals, and that savings are based upon the avoided cost of capacity. The commission agrees with Cities that ratchets should not be applied to an EECRF charged on a demand basis, and that charging the EECRF based on actual monthly peak demand will reduce customer confusion. As energy efficiency costs are of a different nature than those costs that are typically recovered using a demand ratchet mechanism, a demand ratchet is not appropriate for EECRF billing purposes. In addition, applying the EECRF to the commercial customer's actual monthly peak demand, for commercial customers typically billed on a demand basis, will provide a more immediate incentive for those types of customers to reduce their peak demand. Therefore, the commission adopts the requirement that the EECRF be billed as an energy charge for commercial rate classes whose base rates do not provide for a demand charge, and the commission permits either an energy or a non-ratcheted demand charge for those commercial rate classes whose base rates provide for a demand charge. Having both an energy charge and a demand charge for the EECRF for a rate class would add unnecessary complexity. Therefore, the commission has precluded this option in the adopted rule. For rate classes that are billed on a demand basis, whether to design the EECRF to provide for an energy or demand charge will be determined in the EECRF proceedings based on the particular relevant facts.

Proposed subsection (f)(7) is adopted subsection (f)(6), and the provision has been changed to clarify that a utility will have more than one EECRF.

Proposed subsection (f)(8); adopted subsection (f)(7)

Beneficial Results, CLEAResult, Joint Utilities, Public Citizen, and SEED Coalition suggested eliminating the cost caps. Joint Utilities recommended removing the EECRF cost caps from the rule entirely and instead considering the costs within the EECRF proceedings.

However, REP Coalition stressed the importance of the cost caps, as well as their uniform application to all utilities, and asserted that PURA §39.905 authorizes energy efficiency programs, but makes the programs subject to cost ceilings established by the commission. It stated that the commission adopted the current cost ceilings to control the program cost impacts that are borne by residential customers. Prior to the current EECRF caps, the programs were subject to budget-based caps on program expenditures, which provided less certainty to REPs and their customers about the level of recoverable program costs. With respect to the commercial customers, it asserted that the commission adopted cost ceilings for commercial customers based on the level of energy consumption due to the impracticality of adopting uniform rate caps for all classes of commercial customers. REP Coalition said that the adoption of the current cost ceilings provided REPs with critical information needed regarding future adjustments to the EECRF.

TX ROSE and TLSC agreed with REP Coalition that cost caps provide transparency, cost control, and rate certainty. They recommended that the cost caps be maintained until the programs and costs have been reviewed by the EM&V contractor. In the meantime, they recommended that the commission avail itself of the good cause exception for utilities that are unable to meet their goal without an increase to the rate cap.

Commission response

The commission agrees with REP Coalition that the intent of the commission in adopting the cost cap on a per-customer basis for residential customers was to control the rate impact on residential customers as much as possible. The overall commercial cap allows the utilities more flexibility due to the varying characteristics of the commercial customer classes, while still limiting the total impact on commercial customers. Further, the good cause exception provision provides a mechanism to address concerns about utilities achieving the goals. As a result, the commission disagrees with the comments provided by Beneficial Results, CLEAResult, EDF, Joint Utilities, and Sierra Club, and retains the EECRF cost caps.

The commission has revised the residential cost cap to be based on a per kWh cap in order to be consistent with the revisions in adopted subsection (f)(6) (proposed subsection (f)(7)) regarding the design of the EECRF. In addition, the commission strikes portions of this subsection that discuss the calculation of the EECRF, as this is addressed in adopted subsection (f)(1).

CLEAResult, EDF, Public Citizen, SEED Coalition, and Sierra Club highlighted the resource adequacy issue within the ERCOT region. Public Citizen and SEED Coalition asserted that, given risk of increased consumer electric prices due to the potential increase in the system-wide offer cap in ERCOT, it would be in the consumer's best interest to substantially increase the cost caps on energy efficiency programs and reduce predicted load growth. Sierra Club acknowledged the commission's decision to raise the scarcity pricing mechanisms such as the system-wide offer cap and mentioned the potential for more proposed rules in 2013 and 2014, but expressed skepticism at whether these proposals would result in more generation. It stated that ERCOT has done a preliminary "Back Casting" scenario of various stakeholder proposals and found that these proposals, if implemented in 2011, would have raised the overall price of energy between $3.00 per MWh, if no additional changes are made, to as much as $40 per MWh, if all potential changes to the power balancing curve, cap, and peaker net margin were adopted. It asserted that the cost of energy efficiency programs would be much less than the anticipated cost increases related to the proposed resource adequacy related rules since energy efficiency programs in Texas largely targeted peak demand.

Based upon its review of benchmarked program costs throughout the U.S., CLEAResult recommended that a thorough analysis be undertaken to set the cost caps, considering that the current cost caps are set at one-third of typical energy efficiency riders. It, too, stated that energy efficiency could be used as a means of reducing capacity strains. It also stated that the current cost caps were artificially low, and until a thorough review of the current cost caps is completed, the commission should double the cost caps for rural utilities and those in areas in which customer choice is not offered.

TIEC recommended that the commission reject EDF, Public Citizen, SEED Coalition, and Sierra Club's proposals to raise the cost caps on the justification that increasing the budgets for energy efficiency programs will help with the current resource adequacy concerns. They asserted that EDF, Public Citizen, SEED Coalition, and Sierra Club's reasoning is incorrect and conflicts with the Brattle Report. They observed that the Brattle Report emphasizes that in order for demand response to play a pivotal role in the wholesale market, it must be market-based and play a role in price setting. They noted that utility-run energy efficiency programs meet neither criterion. They commented that in the report, the Brattle Group discouraged market intervention as a means to increase demand response through out-of-market payments with respect to the Emergency Response Program (ERS); those principles apply equally to focusing efforts to increase demand response on regulated utility programs. They stated that the commission should facilitate any additional demand response in the ERCOT market through the market, not ratepayer-funded, subsidized, regulated utility energy efficiency programs.

Commission response

The commission agrees with TIEC that resource adequacy concerns in the ERCOT region are best addressed through market-based solutions. While energy efficiency reduces load growth, it is not appropriate to conflate the commission's and ERCOT's market design efforts meant to ensure sufficient generation margins with utility energy efficiency programs. Therefore, the commission will not consider resource adequacy issues in setting the energy efficiency cost caps.

Beneficial Results, EDF, Joint Utilities, Public Citizen, and SEED Coalition expressed concern that the proposed cost caps would limit the ability of the utilities to achieve their goals. Public Citizen and SEED Coalition stated that under the existing caps it will be difficult for utilities to achieve the statutory requirements, especially if energy consumption continues to rise per ERCOT's predictions. EDF asserted that the level of the cost caps are too low to enable utilities to meet the goals in the statute, explaining that approximately half of the utilities would have difficulty meet-

ing the 2013 goal at the current cost caps. Joint Utilities stated that the cost caps fail to keep pace with the increase in goals, and that the increased low-income requirements along with the possible removal of load management programs will strain utilities' ability to meet their goals under the proposed cost caps. Beneficial Results asserted that the cost caps limit the benefits available through these programs, and urged the commission to increase the cost caps to enable greater savings.

OPUC noted that most utilities met their goals and earned a bonus in 2011, and stated that there seemed to be no justification for raising the cost caps if utilities are meeting or exceeding their goals. It stated that it was unaware of any case in which a utility was denied recovery or even a bonus due to the fact that it was unable to meet its goals within the cost caps. It commented that utilities that are unable to meet their goals within the spending caps should request a good cause exception in their EECRF case. If necessary, the cost caps should be revisited in a later revision of this section.

Sierra Club engaged Green Energy Economics Group (GEEG) to estimate how much Texas utilities would need to spend on energy-saving demand-side management (DSM) to achieve the minimum goals. In its findings, GEEG noted that economies of scale and diminishing returns on efficiency resource acquisition costs were evident as utilities increase the depth of electricity savings achieved; efficiency investment costs increase as efficiency portfolios mature; non-residential efficiency investment tends to cost less per annual kWh than residential; and that locations matter in that efficiency portfolios in California and New England tend to be more expensive than elsewhere. Sierra Club provided a study of GEEG's findings in its comments. It recommended that the commission increase the cap and allow an annual adjustment based upon a maximum of 10% per year, which assumes that incentives will need to increase to maintain and expand the goals in the future. It, along with Texas Citizens, stated that cost caps should be at least 50% greater than previous cost caps, to the equivalent of $2 a month for residential and $0.0001 per kWh for commercial customers. It stated that the clear legislative intent is to allow utilities to move beyond the minimum goals where possible under reasonable cost caps.

TREIA agreed with the positions of Beneficial Results, CLEAResult, EDF, Joint Utilities, Public Citizen, SEED Coalition, and Sierra Club that the cost caps prescribed in the rule are too low. TREIA responded that renewable DSM programs have made progress in transforming the market by consistently and predictably lowering offered incentive levels. It asserted that the solar PV programs are on a trajectory to be cost-effective within the next several years, but the proposed cost caps would likely derail the progress by forcing incentive levels too low, too quickly, or by forcing utilities to eliminate such offerings altogether. It stated that higher cost caps provide utilities with additional flexibility to include some higher-cost programs for diversity, experience, and market transformation.

Commission response

The commission appreciates the comments of the parties regarding the ability of utilities to achieve the statutory demand reduction goals. The commission understands that the goal for 2013 and beyond represents an increase to 30% of the utility's growth in demand of residential and commercial customers pursuant to PURA §39.905(a)(3). However, the commission agrees with OPUC that utilities have not been denied a recovery amount or a bonus as a result of non-attainment of the goal, and that a majority of utilities appear to be meeting and exceeding the goal, which results in the achievement of performance bonuses. In addition, in the future, EM&V should provide for a process that considers how programs can be designed for maximum cost-effectiveness and attainment of the goal. As the EM&V process has not yet been implemented, the commission has not had an opportunity to study available avenues to assist the utilities in achieving their goals under the current cost caps. The commission declines to adopt a higher cost cap on the basis of assisting utilities in achieving their goals, as a majority of utilities are exceeding the goals, and the proposed rule provides for a good cause exception to the cost cap that will assist utilities that are unable to meet their goals under the cost cap.

In response to arguments raised by TREIA, the commission notes that PURA §39.905(e) provides for research and development funds to be capped at 10% of the commission-approved expenditures for energy efficiency in the previous year. Therefore, the commission concludes that it is not appropriate to raise the cost cap to support research and development and experience in the marketplace when an avenue has already been made available through a capped research and development program.

CLEAResult recommended that the cost caps be doubled for smaller, less metropolitan and/or non-ERCOT utilities. Sierra Club stated that the proposed cost caps prevent utilities from meeting the energy efficiency goals in SB 1125. It noted that in this year's EECRF filings, Sharyland, TNMP, and EPE, stated that they would be unable to meet the 30% growth in demand goal unless they substantially exceeded the proposed cap on spending. It further noted that to stay within the cap, each utility asked for a good cause exception and much lower goals. It asserted that to realize the maximum potential of the energy efficiency resource and to fully implement the Legislature's intent the commission should implement a program in which all utilities can meet the statutory goals. It asserted that if the commission raises the cap, these three utilities would be able to raise their proposed goals, giving customers in these areas more access to energy efficiency programs.

Sierra Club supported allowing vertically-integrated utilities to have a higher cap than those in the competitive market, stating that vertically-integrated utilities tend to be rural and have higher costs than more urban competitive utilities. These utilities assume all costs for serving their customers, thereby justifying a higher cost for energy efficiency programs because the programs lower overall system requirements. CLEAResult stated that the cost caps create a greater burden for smaller and more rural utilities.

In reply comments, Cities urged the commission to reject calls from parties such as CLEAResult and Sierra Club for higher or non-existent cost caps. They noted that in the immediately previous rulemaking on this section the commission rejected such recommendations because it sought to strike a balance between promoting energy efficiency and cost-effectiveness of the programs. They noted that the desired balance appeared to have been successful; despite utilities' allegations that increases in the cost caps have not kept pace with the increase in the utility goals for energy efficiency, the applications to set 2013 EECRF rates by the utilities all claim to achieve compliance with the cost caps. They noted that while some utilities have requested good cause exceptions, these appear to be exceptions rather than the general rule. They stated that the good cause exception was created to accommodate utilities faced with unusual circumstances, and that these have only been applied sparingly. They asserted

that the retail market needs predictability regarding their exposure to the EECRF. Cities stated that significantly increasing the caps will upset the balance sought by the commission in the current rule and will place greater pressure on the rates paid by the general body of ratepayers, most of whom cannot, or do not, participate in the energy efficiency programs.

Commission response

The commission notes that the good cause exception provision should provide parties advocating for a higher cost cap on the justification of greater savings a mechanism by which to advocate for higher rates in an EECRF proceeding. The commission wishes to ensure that the utilities have exhausted all the low-cost, high-benefit energy efficiency options before migrating to a higher cost cap. The addition of EM&V and expanded annual proceedings will allow the commission the opportunity to better ascertain whether all the low-cost, high-benefit options have been exhausted.

With respect to utilities operating in an area in which customer choice is not offered, the commission notes that PURA §39.905(h) allows those utilities to provide rebate or incentive funds directly to customers, which may reduce administrative costs and provide for more incentive funds under the cost caps. With respect to rural areas, PURA §39.905(i) allows a utility operating in an area in which customer choice is offered to provide incentive and rebate funds directly to customers after a demonstration in a contested case hearing that they cannot meet their goals through retail electric providers or energy efficiency service providers, which may also assist in reducing the program and administrative costs spent by the utility. As PURA already provides this assistance in both rural areas in which customer choice is offered and in areas in which customer choice is not offered, these avenues should be considered before raising the cost caps for the reasons discussed by the parties above.

CLEAResult and Sierra Club stated that the cost caps are low relative to other states. Sierra Club noted that Austin Energy has proposed a rate of three times the limit prescribed in this rule to funds its energy efficiency programs, and that CPS Energy spends nearly $5 per month per customer. CLEAResult asserted that the caps are arbitrarily low, resulting in some utilities either filing exceptions to the goal or reducing the savings that could be achieved beyond the minimum goal. It recommended that cost caps be set at or above the median rates for utilities with state-wide energy efficiency goals.

Commission response

The commission is not persuaded that the cost caps relative to other states or areas are relevant to the standards set by this commission. While it provides a useful comparison, the individual characteristics of the state such as the competitive market, extreme summers, and the legislatively-mandated goals differentiate Texas from many other large states such as California. The commission notes that both examples cited by Sierra Club are municipally-owned utilities, which have energy efficiency programs governed by the policy goals of their municipal governments as opposed to the policy goals of the legislature.

Cities, City of El Paso, CLEAResult, EDF, Joint Utilities, REP Coalition, Sierra Club, TX ROSE, and TLSC opposed the proposed rule's CPI adjustment for a wide variety of reasons. CLEAResult, EDF, REP Coalition, and Sierra Club commented that cost pressures for energy efficiency are unrelated to the CPI. Joint Utilities asserted that energy efficiency costs are likely to grow at a rate higher than an inflation adjustment.

Sierra Club opposed the CPI adjustment, supporting instead either a 10% surcharge per year on cost caps with a petition from utilities, or language similar to that proposed by CLEAResult which would allow a group of utilities to petition the commission for higher cost caps due to escalating costs.

TX ROSE and TLSC agreed that CPI is not an appropriate index to adjust the cost caps and encouraged the commission to delete the proposed language. Additionally, they recommended that the cost cap for 2013 include all subsequent years until the commission by rule amends the cost caps, asserting that some programs such as behavioral and self-delivered programs have costs that are likely to decrease and accompanying incentive costs of the utility can also decrease.

REP Coalition stated that the Legislature could have incorporated the CPI in a manner similar to the use of the index to annually update universal service support amounts pursuant to PURA §56.032(d)(2). It recommended deleting the entire subsection, and urged the commission to continue to consider and approve multiple cost ceilings with future effective dates, rather than adopt an index to adjust annually. Joint Utilities concurred with REP Coalition that inflation is not the best indicator of changing program costs, but asserted that the CPI adjustment recognized the increasing costs and offers some relief to utilities unable to meet their energy efficiency goals.

REP Coalition recommended amending subsection (f)(8)(B) and (D) to indicate that the cost caps for residential and commercial customers in program year 2013 will continue to apply in subsequent years, unless otherwise adjusted by the commission. Joint Utilities argued that if the commission eliminated the CPI adjustment, they agreed with REP Coalition's proposal to specify multiple cost ceilings for different years, so long as the caps are set at levels high enough to enable the utilities to meet their statutory goals.

City of El Paso commented that the provision allows the charges to customers to be increased without regard to any other costs in the utility's cost structure. It stated that the CPI adjustment does not contemplate that cost by which items could decrease on a per-unit basis due to growth in customers or sales, or that costs related to programs could decrease without regard to the CPI. It further stated that PURA §36.201 prohibits an automatic pass through of changes in costs, and that the effect of the CPI adjustment would be to build in an automatic increase in customer rates each year that the CPI changes, violating the principles of ratemaking. It noted that the exceptions in PURA §36.204 still address the issue of the reasonable costs and changes in those costs. It recommended that the commission substitute "may" for "shall" at a minimum, if it does not delete subsection (f)(8)(E).

In reply comments, Cities noted that utilities acknowledged that the proposed rule already includes a CPI adjustment. While Cities opposed the CPI adjustment, they recommended that should the commission include the adjustment, there is no justification to increase or eliminate cost caps. They agreed with City of El Paso's opposition to a CPI adjustment. They disagreed with the automatic CPI adjustment, stating that CPI only measures the *prices* of goods and services purchased by customers. They commented that changes in cost involve both changes in price and changes in the quantity of labor and materials used, which are driven by productivity. They stated that CPI does not reflect the extent that customers reduce their

costs by replacing the purchase of higher-priced products with lower-priced subsidies, and is therefore not an appropriate measure of the need for higher cost caps.

CLEAResult recommended that the CPI adjustment be eliminated unless a more thorough and germane index, which accounts for baseline changes and regulatory requirements, is referenced.

Commission response

In response to arguments raised by the City of El Paso with respect to PURA §36.201, this section prohibits an automatic *rate* adjustment, not an automatic *cap* adjustment. As a utility must file an application to adjust its EECRF, the EECRF cannot be automatically adjusted.

In response to the claims that energy efficiency cost pressures are unrelated to a CPI increase, the commission would note that, with respect to residential customers, it is primarily concerned with the customer impact of EECRF rates. If the EECRF cap is raised at an amount higher than inflation, the EECRF charges would become an ever-larger share of a typical customer's cost of living. Therefore, the commission concludes that a CPI-South adjustment is a reasonable means of increasing the cap while protecting customers from excessive EECRF increases. A CPI-South adjustment will appropriately adjust the EECRF cap for inflation.

Joint Utilities stated that EM&V costs are outside of the utility's control and were not envisioned when the current cost caps were set. They argued that if they are now included within categories of costs that are capped the caps must be increased accordingly.

CLEAResult recommended that EM&V, rate case, and incremental low-income costs not be subject to cost caps unless the cost caps are raised to reflect adding EM&V and rate case expenses.

In contrast, OPUC stated that the costs of the EECRF proceedings should be included in the cost caps, and must be reviewed prior to being granted, in order to control costs and ensure that the cases do not become even more contentious. It proposed striking the exemption language for rate case expenses in subsection (f)(8).

REP Coalition opposed both exemptions to the cost ceilings in subsection (f)(8)(A) - (D), asserting that the statutory provision in PURA §39.905(b)(1) envisioned the energy efficiency programs offered by the utilities as "subject to cost ceilings established by the commission." It stated that the EECRF rates should be set to recover the exempted costs. With exemptions, the cost caps in subsection (f)(8) are not true cost caps. It asserted that cost ceilings provide cost transparency, cost control, and rate certainty, as well as more informed pricing of retail products and services to retail customers; without "true" cost caps, those benefits are lost. It asserted further that adoption of exemptions is unnecessary given the availability of good cause exceptions under the proposed amendments to the rule in subsection (e)(2). While REP Coalition admitted that a good cause exception also results in a loss of the benefits described above, it asserted that the good cause exception must be requested by the utility, may be contested in an EECRF proceeding, must show good cause, and, if granted, is only applicable to that proceeding. It believed that the availability of a good cause exception to the cost ceilings further justifies the rejection of the two proposals to codify exemptions by rule. It recommended deleting the exemptions.

In reply comments to REP Coalition, Cities noted that the commission permitted municipalities to recover expenses for participating in Oncor's 2012 EECRF proceeding. They recommended that the commission reject the suggestions of REP Coalition and OPUC to subject rate case expenses to either the overall cost cap or the administrative cost caps. They responded to arguments about transparency and cost control with the assertion that the staff reviews municipal rate case expenses to ensure that such expenses are reasonable. Additionally, they asserted that they review their own municipal rate case expenses prior to submitting such expenses for reimbursement for duplications or unreasonable charges. They noted that these expenses are filed in the docket for which reimbursement is sought as a part of Cities' direct case, obviating REP Coalition's concerns about transparency.

In reply to the comments of the REP Coalition regarding rate certainty, Cities stated that EECRFs change rates every year, and it is impossible for REPs to know in advance the true amount a utility will request in any given year's EECRF proceeding, nor can it anticipate good cause exceptions or many factors which may alter the EECRF amounts a utility not only requests but the amount ultimately granted by the commission. They asserted that EECRFs themselves create rate uncertainty for the REPs, and that placing municipal rate case expenses within utility administrative cost caps cannot change that. They noted that applications begin in May, are generally resolved in September or October, and the rates do not go into effect until January, giving REPs plenty of time to make necessary billing changes.

Joint Utilities stated that the utilities have no control over municipal rate case expenses, and that the inclusion of rate case expenses could cause utilities with smaller program budgets to exceed either the administrative or overall cap where an EECRF case is contested or requires extensive discovery. They noted that the proposed rule also allows OPUC, REP Coalition, TX ROSE, and TLSC to inquire into the reasonableness of the costs during the EECRF process, and that the comments of OPUC, REP Coalition, TX ROSE, and TLSC expressing concern relating to cost control should be rejected. TX ROSE and TLSC disagreed with Joint Utilities that a utility's rate case expenses should not be subject to the cap.

Joint Utilities requested clarification that rate case expenses are exempt from the overall cost cap in the same manner as EM&V costs. They stated that it is consistent with commission practice and precedent to treat rate case expenses separately from energy efficiency program expenses and exclude them from the overall cap. They noted that if rate case expenses were not excluded from the overall cost cap, utilities may have to either reduce program funding to remain below the limit or request a good cause exception or both.

City of El Paso disagreed with Joint Utilities, stating that no special cause exists to treat rate case expenses as apart from the cost of the program and create a further burden on ratepayers. It responded to Joint Utilities' argument that utilities have no control over rate case expenses by replying that the commission will decide the reasonable amount of rate case expenses. It noted that many utilities are at or near the cost cap without including rate case expenses, and that the purpose of a cap is to limit the exposure of ratepayers to the cost of these programs and encourage the utility to operate efficient programs. It said that if the final rule allows the utility to make charges in addition to the cap it defeats the incentive for efficient utility operation.

In reply comments, Joint Utilities stated that while it does not oppose the collection of municipal rate case expenses, updating them in a rate case is unnecessary. They commented that the EECRF proceedings must already be processed within a short period of time, and that the filing of updated information may slow this process. They said that the actual rate case expenses reimbursement is consistent with commission precedent, and contrary to Cities' claim, does not result in risk of non-reimbursement. They stated that if municipal rate case expenses incurred in recent EECRF proceedings are any indication, the risk of sizeable unreimbursed legal fees appears small. They supported staff's proposal that both the utility and municipalities wait for reimbursement to encourage efficiency and cost control and recommended that staff's proposal be adopted.

Commission response

The commission agrees with Cities that municipal EECRF proceeding expenses should be excluded from the cost caps, as these expenses are beyond the control of the utilities. However, the commission believes that it is appropriate to include the EECRF proceeding expenses of the utilities as subject to cost caps. Therefore, the commission modifies the language in the proposed rule to include utility EECRF proceeding expenses within the caps. This change is consistent with the commission's order in Docket Number 40356.

With respect to the inclusion of EM&V costs in the cost caps, the EM&V contractor will be hired by the commission, and therefore, the costs of the evaluation are outside of the utilities' control. The commission will make every effort to select the best-qualified contractor with a competitively-priced bid. However, the commission finds that, like the municipal EECRF proceeding expenses, the EM&V expenses are appropriately excluded from the cost caps because they are outside of a utility's control.

Walmart noted that economies of scale might be realized with respect to lower costs of administering the programs. It requested that the commission reconsider whether 15% remains an appropriate cap for administrative costs in light of market development.

CLEAResult asserted that the new 10% budget set aside for expensive low-income programs will place greater cost pressure on the utility's residential portfolios, and that other residential customers who do not qualify for low-income programs may not have access to programs because residential program funds will be exhausted. It additionally recommended that residential low-income programs should not be subject to the cost cap.

TX ROSE and TLSC disputed CLEAResult's assertion, stating that a set-aside for low-income programs has always been statutorily required. They provided legislative history regarding SB 712 of the 79th Legislature, Regular Session, in 2005, which set spending for low-income programs at 2003 levels. They noted that utilities have rapidly increased their energy efficiency program budgets but have not maintained a similar increase for targeted weatherization programs; SB 1434 provided an adjustment for the targeted weatherization funds in recognition of the ever-increasing energy efficiency programs. They asserted that it was unfair to label the low-income weatherization program as expensive without further study and review.

In reply comments, Cities stated that the utilities' premise for needing changes to the caps is based on the assumption that load management programs will be transferred to ERCOT, which they rejected in their initial comments.

Commission response

The commission appreciates the comments of Walmart. However, given several changes in the proposed rule including the expanded annual proceedings, the upcoming EM&V evaluation, the direct assignment of costs to rate classes and tracking of those costs, and the increasing goals, the commission believes it may be premature to reduce the administrative cost cap at this time. The commission declines to adopt the suggestion of Walmart and retains the 15% administrative cap.

With respect to the low-income residential programs, the commission agrees with the comments of TX ROSE and TLSC that the cost caps should not be raised until further study by the EM&V contractor is conducted and recommendations are made regarding these programs.

REP Coalition acknowledged that three new categories of energy efficiency program costs will be recoverable through the EECRF (EM&V, increased costs to low-income energy efficiency program attributable to the 10% floor in PURA §39.905(f), and the costs reimbursed to the governing body of a municipality pursuant to PURA §33.023(b) relating to the municipality's participation in a utility's EECRF proceeding). Due to these changes, it recommended a modest adjustment to the existing cost ceilings in program year 2014 to accommodate all of these costs.

TX ROSE and TLSC recommended retaining the current cost caps for the purposes of transparency and cost control. They noted that the new statutory goals were the same goals established in the 2010 rulemaking, and there is no need to change them at this time. They stated that utilities establish budgets in excess of the statutory goals, citing Oncor and CenterPoint's 2011 EEPRs filed under Project Number 40194, *Calendar Year 2011 Energy Efficiency Reports Pursuant to SUBST. R. §25.181(m).* They acknowledged that a generic cost cap may not be appropriate given the diversity of Texas' utilities, but that there has been no reconciliation proceeding or EM&V implementation to review the costs. They asserted that the current caps should not be modified until the utilities' energy efficiency programs and their costs have been reviewed through a reconciliation proceeding and reviewed in EM&V. Similarly, OPUC recommended reassessing the cost caps after the initial EM&V is complete, arguing that the evaluation should provide insight as to whether the utilities need to spend more to meet their goals and how much more they need to spend.

City of El Paso stated that the cost caps should not be removed or raised in order to encourage efficient utility operation and provide protection for ratepayers. It noted that the burden for showing grounds for a change in a cap should be an extraordinary remedy granted only under certain circumstances.

Commission response

The commission rejects the proposed amendments of REP Coalition, and as discussed in subsections (i) and (q), the municipal EECRF proceeding expenses and EM&V costs are excluded from the cost caps, because these costs are beyond the control of the utilities. In response to TX ROSE, TLSC, and City of El Paso's proposed amendment, the commission believes that the CPI-South adjustment is an appropriate adjustment to the cost caps beginning in 2014, as it will go into effect after the initiation of the EM&V process, concurrent with the expanded annual proceedings, and is a reasonable compromise among parties seeking to retain the current cost cap and to raise or eliminate it altogether.

In addition, for clarity, the commission re-designates subsection (f)(8) as subsection (f)(7) and strikes portions of what has be-

come adopted subsection (f)(6) that describe the recovery of the EECRF, as this is addressed in adopted subsection (f)(1).

Subsection (f)(9)

REP Coalition asserted that the procedural timelines in subsection (f)(9)(B) and (C) should target March 1 as the effective date of any new or adjusted EECRF approved by the commission, and should ensure at least a 45-day notice of any new or adjusted EECRF from the date the utility files its compliance tariff reflecting the commission-approved date. It noted that a target date of March 1 coincides with the semi-annual TCRF update, and a 45-day notice period is consistent with those proceedings as well. It commented that while it understood the need for flexibility in the proceedings, it recommended that the 45-day notice requirement be left intact and not subject to any good cause exception and proposed language to that effect.

Commission response

The proposed rule does not provide for a good cause exception to the time period between the filing of the compliance tariff and the effective date of the tariff: "In no event shall the effective date of any new or adjusted EECRF occur less than 45 days after the utility files a compliance tariff consistent with a final order approving the new or adjusted EECRF." Inter-related with this 45-day period is the requirement in the proposed rule that the utility serve notice on REPs of the approved rates and the effective date of the approved rates by the working day after the utility files the compliance tariff. In response to REP Coalition's comments, the commission has modified subsection (f)(9)(B) and (C) to reinforce its intention that neither the 45-day period nor the one working day deadline are subject to good cause exceptions.

Subsection (f)(10)

TX ROSE and TLSC proposed new language requiring the utility to provide the results of the utility's EM&V activities, to be submitted in the EECRF proceeding, along with a report of proposed corrections or corrections to deficiencies identified in the EM&V study. They stated that the results of the EM&V study should be used to adjust the amount collected by the EECRF. They asserted that the utility should be required to describe the process for procuring the EM&V contractor and how that process ensures the contractor's independence, and that the EM&V contractor should also be assigned to review the EEPR and support the EECRF application. They also proposed language to require EM&V reports filed by the EM&V contractor appointed by the commission that relate to energy efficiency programs for previous years and for the time new EECRF rates will be in effect.

Cities supported the requirement in the published rule that a utility requesting an EECRF file explanations of administrative costs in its application. They suggested that utilities be required to file information regarding any affiliate costs for which the utilities request recovery from consumers, which would allow intervenors to verify that the utility has met the standard under PURA §36.058 for affiliate costs.

Cities opposed the removal of the requirement that a utility file billing determinants of the most recent year and for the year in which the EECRF is expected to be in effect in its EECRF filing. They stated that a review of the billing determinant forecast is necessary to ensure that the utility has attempted to minimize over- and under-recoveries. They stated that removal of this requirement would result in a greater discovery burden and decreased transparency. They recommended that the language requiring the utility to file in its EECRF "billing determinants for the most recent year and for the year in which the EECRF is expected to be in effect" be retained in the current rule at subsection (f)(9)(B).

In response to the suggestion by Cities, TX ROSE, and TLSC, Joint Utilities stated that it did not support the suggestion to add "reconciliation" to the proposed rule in subsection (f)(10)(D). They commented that the EM&V contractor will examine the utilities' programs on an annual basis. The contractor may conduct discovery throughout the process and will issue a report with recommendations that parties will be able to address in the context of future EECRF proceedings. They stated that Cities, TX ROSE, and TLSC failed to state why this process will not address their concerns, and that this suggestion should be rejected.

OPUC stated that the EECRF must account for actual energy efficiency base rate revenues, and that the language in subsection (f)(10)(B) should make clear that it is the amount of money that the utility collected through base rates rather than what the utility's final order allows it to collect through base rates. It stated that it was not clear as to the meaning of subsection (f)(10)(F), and opposed any suggestion that the utilities be allowed to spend beyond their approved budget and up to the cost caps. It stated that the EECRF proceedings are designed to evaluate the proposed budget and are approved as a reasonable estimate. It stated that if the intent of the subsection is that the utilities' budgets do not need to be followed, then the projected budget approval process should be discarded as redundant.

OPUC stated it believed the recipients of incentive payments and the number of incentives the recipient has received should be included in this application to help monitor the fostering of competition among energy service providers. Additionally, it proposed language in subsection (f)(10)(I) requiring that the utility provide rate case expense costs and an explanation of those costs.

TX ROSE and TLSC proposed language to add additional requirements and offered clarifications to the new expanded annual proceeding for the previous year's expenditures. Additionally, they proposed to add language so that the reasonableness of the utility's forecasted energy efficiency costs sought to be recovered are considered. In addition, they provided some clarification language for subsection (f)(10)(J) to clarify that the over- and under-recovery be the "actual revenues attributable to the EECRF by rate class for any period for which the utility calculates an under- or over-recovery of EECRF costs." They also recommended language reflecting the utilities' requirement to determine whether the previous year's revenues were sufficient in recovering its reasonable and necessary expenses. They proposed modifications to subsection (f)(10)(K) that would require a utility to show a competitive bidding and engagement process, including those contractors paid with funds collected through the EECRF. They proposed deleting the requirements that any contracts must be treated as confidential, stating that such is unsupported in law and works contrary to public interest in a transparent, competitive market. Sierra Club supported TX ROSE and TLSC's comments, stating that the public should have access to basic information about the programs and insight into which contractors are being paid ratepayer incentives. TX ROSE and TLSC noted that utilities are required to use competitive methods to select contractors.

Commission response

In response to TX ROSE and TLSC's concerns with respect to the EM&V contractor, the commission notes that one EM&V con-

tractor will be retained by the commission, so concerns about a competitive bidding process by the utilities for the EM&V contractor are not warranted.

The commission adopts the proposed language of Cities to require a utility to file explanations of its administrative costs in the application, as well as any information on affiliate transactions to ensure compliance with PURA. In addition, the commission retains the language currently in subsection (f)(9)(B) of the existing rule and modifies proposed subsection (f)(10)(E) to retain the current language, as Cities suggested.

The commission amends subsection (f)(10)(B) as OPUC suggested to clarify that actual base rate energy efficiency revenues are accounted for in the EECRF calculations by requiring a consideration of changes in load when calculating base rate recovery of energy efficiency costs, and adopts OPUC's suggested language for subsection (f)(10)(I) to include supporting information for EECRF proceeding expenses. The commission rejects the modifications proposed by OPUC for subsection (f)(10)(F), because while a utility plans a budget for projected expenditures, it is allowed to make reasonable deviations from that budget in the course of the program year. However, the commission retains full discretion to approve or disallow those historical costs. This allows the utilities some degree of flexibility in the program year while also continuing to ensure that those costs are reasonable. The commission adopts the proposal of OPUC to modify subsection (f)(10)(H) regarding incentive payments and requires a utility who provides more than 5% of its overall incentive payments to any administrator or energy efficiency service provider to provide a copy of the applicable contracts in the utility's EECRF filing. The commission notes that one of the goals of the energy efficiency programs is to foster the growth of the number of energy efficiency service providers and REPs providing competitive services. The information proposed by OPUC will allow the commission and intervenors to determine compliance with subsection (i)(2), which states that a utility should limit the number of projects or level of incentives that a single service provider and its affiliates are eligible to receive.

The commission believes that the information requested by TX ROSE and TLSC for subsection (f)(10)(J) and (K) is reasonable, but maintains that any competitively-sensitive information should be treated as confidential when it is filed with the commission.

In addition to the changes in response to comments, the commission has modified subsection (f)(10) to require utilities to submit all schedules in their applications in Excel format by retail rate class. This will assist the commission and intervenors in reviewing the applications and calculating proposed rates.

Subsection (f)(11)

Cities opposed the language proposed in subsection (f)(11)(B), stating that it shifts too much discretion away from the commission and places it instead with the EM&V contractor. They asserted that the language as currently proposed indicates that if the EM&V contractor found no material deficiencies in the utility's administration of its portfolio of energy efficiency programs, this would preclude any examination of the reasonableness of the utility's programs. They stated that PURA §39.905(b)(1) provides that the commission is ultimately responsible for determining the reasonableness of the utility's requested EECRF recovery. They asserted that while the EM&V contractor's review of a utility's program portfolio may be helpful evidence for the commission's consideration, the EM&V contractor's review should not be determinative and proposed language to this effect.

TX ROSE and TLSC made several suggested revisions to this subsection. They proposed language in subsection (f)(11) that would be a more direct statement concerning relevant factors that should be considered by the commission. They proposed language to amend subsection (f)(11)(B) to determine "whether the EM&V contractor has found any material deficiencies in the utility's administration of its portfolio of energy efficiency programs and whether the program portfolio was implemented in accordance with the recommendations made by the commission's EM&V contractor and approved by the commission." In addition, they proposed language for subsection (f)(11)(C) to clarify that the low-income expenditures must be no less than 10% of the utility's energy efficiency budget for that year, and for subsection (f)(11)(D) to clarify whether market conditions in the utility's service territory affected the ability to implement one or more of the energy efficiency programs or was a factor in its costs. They proposed language for subsection (f)(11)(E) to place the use of the utility's previous energy efficiency program costs and achievement into context. They proposed language for subsection (f)(11)(F) - (H) for clarification whether circumstances, the number of energy efficiency service providers, and customer participation have affected the ability of the utility to implement its programs or affects its costs. They proposed language for subsection (f)(11)(I) clarifying whether the utility's energy efficiency costs for the previous year or estimated for the year the requested EECRF will be in effect are comparable to costs in other markets with similar conditions. They recommended that the current subsection (f)(11)(J) be deleted as it is unnecessary with their proposed revisions, which cover the "et. al." phrase, and recommended new language which clarifies whether the utility set its incentive payments to maximize its energy and savings goal at the lowest reasonable cost per program. They proposed language for subsection (f)(11)(K), recommending a new factor which clarifies whether the utility's expenditures could have been leveraged with existing public or non-public energy efficiency programs to decrease operating costs. They noted that if energy efficiency costs can be decreased because of leveraging these relationships, consumers and utilities benefit, as utilities obtain energy savings at a more efficient cost, thereby increasing their opportunity for a bonus and lowering the overall EECRF rate.

Commission response

The commission declines to adopt TX ROSE and TLSC's proposed language for subsections (f)(11) and (f)(11)(A), because the determination of whether a utility's expenses were reasonable will be determined during the true-up/reconciliation portion of EECRF proceedings as outlined under subsection (f)(12). The factors outlined in subsection (f)(11) pertain to the setting of the utility's budget for the upcoming year. The commission believes that TX ROSE and TLSC's proposal for a new subsection (f)(11)(B) is not necessary. The commission prefers to retain the proposed language for subsection (f)(11)(C) to incorporate the statute by reference and avoid the need for the commission to reopen the rule in the case that the Legislature revises the targeted low-income set-aside.

The commission adopts the language proposed by TX ROSE and TLSC for subsection (f)(11)(D) - (J) to expand and clarify the items that must be addressed in a utility's EECRF to support the recovery of program costs. As the performance bonus has been revised to encourage utilities to maximize net benefits, the commission does not believe it is necessary to add TX ROSE and TLSC's proposed language to subsection (f)(11)(K), as utilities will already have an incentive to seek such opportunities.

The commission is persuaded by the comments of Cities and adopts language for subsection (f)(11)(B) similar to the language proposed by Cities, but does wish to clarify that this subsection applies to the reasonableness of expenses not the reasonableness of each of the programs. As stated below under subsection (s), parties that participate in the EEIP process will be afforded several opportunities to weigh in on proposed program design issues.

Subsection (f)(12)

Cities opposed the proposed language in subsection (f)(12), claiming it would severely limit the scope of EECRF proceedings. They stated that the published language would preclude any party from challenging the reasonableness of a utility's energy efficiency portfolio design and would nullify the commission's discretion and authority under PURA, which provides that the commission has the ultimate authority to determine the reasonableness and necessity of a utility's energy efficiency program offerings. They asserted that a determination of prudence is critical to determining the reasonableness of the costs. They proposed language which would expand the scope of the proceeding to include the utility's compliance with PURA §39.905 and the rule, an examination of the whether the costs were reasonable and necessary, and language prohibiting the recovery of affiliate expenses.

TX ROSE and TLSC also asserted that the EECRF proceedings will be the only opportunity for parties to determine that the programs were approved in compliance with the EEIP process. They proposed adding to the list of findings of fact required in the EECRF to include whether the proposed EECRF rates complied with the requirements of PURA §39.905(f).

Joint Utilities opposed Cities, TX ROSE, and TLSC's proposal to include program design issues in the scope of the EECRF proceedings. They believed that stakeholders have the opportunity to provide input on changes in program designs when the energy efficiency plans and reports (EEPRs) are filed and during the EEIP process. This ensures that the potential arguments over program design issues take place before the programs costs are incurred.

Commission response

The commission declines to make the changes proposed by Cities, TX ROSE, and TLSC. As stated in subsection (f)(12): "The scope of an EECRF proceeding includes the extent to which the costs recovered through the EECRF complied with PURA §39.905 and this section, and the extent to which the costs recovered were reasonable and necessary to reduce demand and energy growth. The proceeding shall not include a review of program design to the extent that the programs complied with the energy efficiency implementation project (EEIP) process defined in subsection (s) of this section." Contrary to the Cities' position, the commission has not proposed to preclude any party from challenging the reasonableness of the programs offered by the utilities. Rather, the commission has expanded the existing EEIP process to include a more robust discussion and opportunity for comment on proposed programs and program design changes. There are two additional items added to subsection (s) that the commission would like to highlight. First, a utility offering new programs or making significant changes to an existing program would be required to file a petition with the commission in a separate proceeding. Second, any party that is not satisfied with the outcome of an EEIP project can file a petition with the commission. The commission believes these additional protections are sufficient to allow the bifurcation of program expenses and program design between the EECRF proceedings and the EEIP process.

Adopted subsection (f)(13)

TX ROSE and TLSC proposed adding the state agency that administers the federal weatherization program, currently the Texas Department of Housing and Community Affairs (TDHCA), to the list of parties that receive notice in an EECRF proceeding. They maintained that since TDHCA is statutorily obligated to participate in the proceedings, it should be afforded notice to facilitate its participation.

Commission response

The commission agrees with TX ROSE and TLSC that providing notice to the state agency that administers the federal weatherization program is appropriate and has amended the language accordingly.

Existing subsection (f)(13)

Entergy Cities raised concerns that utilities were relying on the changes proposed in this rulemaking, which includes an annual true-up proceeding in lieu of a three-year reconciliation proceeding, to avoid filing a reconciliation of the EECRF expenses pursuant to this subsection in the current rule. They noted that the proposed rule replaces the triennial reconciliation proceeding with a provision that permits the review of the reasonableness and necessity of energy efficiency costs annually as part of the EECRF filing. They noted that they have attempted to address concerns regarding the expenses incurred in past program years during previous proceedings. However, testimony filed in the prior proceeding became subject to motions to strike and they were denied discovery regarding past program year EECRF expenses based upon the premise that the reasonableness and necessity of the EECRF costs would be addressed in a future reconciliation. They filed documentation from a previous EECRF proceeding in support of this claim. They stated that the obligation to seek a determination of the reasonableness and necessity of EECRF costs incurred in prior years should not be waived. They recommended that, as a remedy, the commission require the first annual filing pursuant to the revised energy efficiency rule include in its scope a determination of the reasonableness and necessity of past EECRF program years, for programs that have not been determined reasonable or necessary. Alternatively, they proposed that the each utility could be required to file for a first and final reconciliation of past program year EECRF expenses.

Cities opposed the proposed rule change to remove the current rule's requirement for utilities to reconcile their energy efficiency costs and revenues every three years. They noted that the commission has yet to undertake a reconciliation proceeding. They stated that EECRFs are to be processed in only 120 days if a hearing is requested, pursuant to subsection (f)(10)(B), and asserted that this is not enough time to complete a full review. They stated that a separate reconciliation proceeding would better facilitate a full review of the reasonableness of the costs. They asserted that the purpose of the EM&V process is to help utilities create portfolios consisting of programs that capture the most peak demand reductions at the lowest possible price, and is not designed to replace the reconciliation proceeding. They recommended that the final rule retain the language requiring a three-year reconciliation proceeding.

Commission response

Adopted subsection (f)(12) provides that the scope of an EECRF proceeding includes the extent to which the costs recovered through the EECRF complied with PURA §39.905 and this section, and the extent to which the costs recovered were reasonable and necessary to reduce demand and energy growth. This expansion of the scope of an EECRF to address what is referred to in the existing rule as a reconciliation is accommodated in subsection (f)(9) through a longer timeline for completing an EECRF proceeding. Subsection (f)(1) provides that the EECRF shall be calculated to recover the preceding year's over- or under-recovery. The commission clarifies that it intends that the adopted rule to be interpreted as follows: A utility has over-recovered costs in the preceding year to the extent that it has recovered costs through the EECRF, in the preceding year or any other prior year, that do not comply with subsection (f). For the 2013 EECRF proceeding initiated by a utility, the reasonableness of incurred expenses for all years prior to 2013 shall be an issue to be addressed because those expenses have not been reconciled. After the 2013 EECRF proceeding, the reconciliation in an EECRF proceeding will be limited to the costs recovered in the preceding year because parties will have had an opportunity in prior EECRF proceedings to challenge the appropriateness of the expenses recovered in years prior to the preceding year and the commission will have determined in those prior EECRF proceedings whether those expenses complied with subsection (f)(12).

In the proposed rule, the commission included in the scope of the EM&V contractor's responsibilities under subsection (q)(4)(C) an evaluation of the programs offered during the program years that would have been subject to the reconciliation proceeding contemplated under the existing rule. Given that a reconciliation proceeding is set to occur in 2013 for all prior years, the EM&V contractor will not be involved in this proceeding, because the EM&V contractor would not have time to review the prior year's programs. Further, the commission intends for the EM&V contractor to focus on evaluating programs in order to improve them on a prospective basis, rather than evaluating them in order to review the appropriateness of program expenses already incurred. Therefore, the requirement for the EM&V contractor to review the programs in operation prior to 2012, as stated in subsection (q)(4)(C), has been removed.

Subsection (g); Incentive payments

TX ROSE and TLSC stated that a major problem with the current rule is its failure to ensure that customers participating in the program benefit from the incentives paid by the utilities for energy efficiency programs. They commented that since there is no requirement to pass on the incentive payment to the ultimate customer, no information is available as to what extent customers benefit from the program. They recommended amending proposed subsection (g) to require all contractors paid incentives by the utility for energy and demand savings to pass the full amount of the incentive through to the customer.

Joint Utilities requested that the commission reject TX ROSE and TLSC's proposed modifications. They stated that in some cases, a portion of the incentive provided to a contractor must be used for marketing, energy assessments, and related tasks. If all incentives were passed through to the customer, there would be little or no benefit for contractors or project sponsors to participate in the program. They also noted that providing the incentive directly to a customer in a lease property or multi-family home would not be appropriate if the cost incurred was borne by a landlord.

Commission response

The commission agrees with Joint Utilities that it is not always appropriate for the customer to receive the full incentive provided by the utility to the energy efficiency provider. TX ROSE and TLSC's recommendation does not consider that utilities are restricted by PURA §39.905(a)(1) from administering competitive services under the energy efficiency programs, and therefore, additional costs will be incurred by project sponsors and contractors that might be accounted for in the incentive payment. The commission rejects TX ROSE and TLSC's recommendation and adopts subsection (g) as proposed.

Subsection (h); Energy efficiency performance bonus

TX CHPI recommended that the commission modify the bonus calculation in subsection (h) to include incentives awarded to long-range efficiency projects not yet completed or commissioned in order to account for project timetables associated with combined-heat and power projects.

OPUC stated that a bonus should only be awarded to a utility for exemplary behavior and not to a utility that does not achieve its goals or exceeds the costs caps; TX ROSE and TLSC agreed. OPUC recommended modifying subsection (h) so that a utility *may* be awarded a performance bonus. Joint Utilities disagreed and stated that the bonus is not for exceptional achievement, but rather a mechanism to incentivize greater implementation of energy efficiency programming and to partially offset lost revenue. The revisions proposed here, and under proposed subsection (h)(4), serve to de-incentivize utilities and would re-open the subject of a lost revenue recovery mechanism to provide reasonable opportunity to meet and surpass energy efficiency goals without unreasonable risk of loss. In its reply, TNMP commented that the bonus provided for under the rule allows the utility to share in a small fraction of the benefits delivered by the programs and is subject to a cap. It stated that the bonus provides a utility a partial offset of lost revenues where the programs reduce load and energy sales from the level on which base rates may have been set.

Commission response

The commission disagrees with TX CHPI that bonuses should be awarded for energy efficiency projects not yet completed or commissioned. Bonuses should be based on actual savings achieved rather than incomplete projects that may never provide savings.

The commission disagrees with OPUC. PURA §39.905(b)(2) requires the commission to establish an incentive to reward utilities administering energy efficiency programs who exceed the minimum goals established by the statute. The commission agrees with Joint Utilities that they are authorized to receive a bonus for exceeding the goals, not for an arbitrary definition of exemplary behavior. The rule already implicitly disallows a bonus for a utility that does not achieve its established goal or exceeds the cost caps from receiving a bonus. However, as explained below with respect to subsection (h)(4), the commission will consider a good cause exception to the statutory goals, the administrative cost caps, and the overall cost caps when determining the appropriate performance bonus.

Subsection (h)(3)

CLEAResult, OPUC, and Sierra Club supported the proposal to change the basis of the bonus calculation from program costs to net benefits. Public Citizen and SEED Coalition stated that utilities should be encouraged to achieve as much energy effi-

ciency as possible and that the bonus is an effective incentive to achieve this goal.

EDF and Cities opposed the proposed changes to subsection (h)(3). EDF stated that changes give utilities less of an incentive to try to control costs while exceeding their goals. Cities requested that the commission reject the changes, suggesting that the proposed language has the potential to greatly increase the bonuses awarded for utilities, especially large utilities with high reported net benefits. They stated that the proposed changes will provide an added windfall to large utilities without any additional actions or improvements to their programs. Further, they commented that net benefits are based on speculative numbers and a net benefits-based bonus could incentivize utilities to make changes to avoided costs forecast assumptions. Joint Utilities stated that the analysis performed by Cities does not accurately present the bonus achievable by utilities under the proposed calculation. They stated that the intent of the proposal is to base the performance incentive on net benefits as a means to tie the incentive to overall customer benefits. They commented that they are concerned net benefits will decrease in the future as a result of technology changes and revised building codes, and have already been decreased by the requirements to increase spending on the low-income programs, which are the least cost-effective programs. Further, if lost revenues were taken into account, the performance incentive ceases to be an incentive at all. They stated that staff's proposal properly recognizes that net benefits will be less in the future and attempts to maintain the status quo. That said, given the comments by OPUC and Cities, Joint Utilities requested that the current method of calculating the bonus stays in place, as there is no need to modify the current rule.

Cites recommended that if the commission decides to base the bonus calculation on net benefits, the maximum bonus be set at 6% of net benefits. OPUC also disagreed with capping the maximum bonus at 10% of net benefits. It proposed that the cap be set at 2% of net benefits to prevent utilities from receiving outrageous bonuses. TX ROSE and TLSC agreed with OPUC in its reply. Joint Utilities and Sierra Club disagreed with capping the bonus at 2%. Public Citizen, SEED Coalition, and Sierra Club recommended that the maximum bonus be restored to 20% as long as the utilities achieve both their demand and energy goals. Sierra Club commented that the bonus is an important mechanism for utilities to recoup losses in sales due to energy efficiency programs given the lack of decoupling or a lost revenue recovery mechanism for the programs. It stated that extra costs associated with the higher bonus are justified by additional savings generated by the incentive. It was supported in its concerns that the proposed changes result in less incentive for utilities to exceed their goals by Texas Citizens. In reply comments, Sierra Club stated that it now believed 10% of net benefits to be a sufficient bonus and that there is no need to increase the bonus level.

CLEAResult believed that it is inappropriate to apply rate case costs to the net benefit calculations. Sierra Club disagreed, stating that the bonus must be limited by the cost caps.

OPUC recommended the bonus calculation be based on energy savings captured through the programs rather than demand savings, as customers are billed on an energy basis and energy savings more directly correlate with bill savings. It noted that the change would end the incentive for utilities to focus on load management as a way of inflating their bonuses since the programs do not produce energy savings. Sierra Club recommended the bonus calculation include both demand and energy savings achieved beyond the goal. It commented that such a change should encourage utilities to exceed their goals in a cost effective manner.

Commission response

The commission appreciates the comments of CLEAResult, OPUC, Public Citizen, SEED Coalition, and Sierra Club regarding the transition of the bonus calculation from program costs to net benefits. The commission disagrees with EDF and Cities that the change de-incentivizes or provides an undue windfall to utilities. As stated by Joint Utilities, the intent of the change is to tie the incentive to overall customer benefits rather than program costs. The commission, therefore, also disagrees with Cities, OPUC, Public Citizen, and SEED Coalition that 10% is an inappropriate cap for the performance incentive. The commission believes that 10%, given that the bonus must also be achieved under the costs caps, is an appropriate attempt to maintain the bonus potential for utilities under the rule.

Regarding CLEAResult's request to remove rate case expenses from the net benefit calculation, the commission disagrees. All applicable expenses should be included in the calculations for an accurate representation of the net benefits of the program. The commission also rejects OPUC's and Sierra Club's recommendations to include energy savings in the bonus calculation. The performance incentive allowed by PURA §39.905(b)(2) is based on a utility exceeding its goals. The goals for energy efficiency outlined in PURA §39.905(a)(3) are based solely on a utility's growth in demand. The commission has adopted a conservation load factor to establish an energy goal in order to encourage the utilities to develop programs with a variety of both energy and demand savings. While the commission has established that a utility must meet the energy goal prior to being eligible to receive a bonus, it believes that the demand goal is the appropriate basis for the bonus calculation. The commission has modified the rule language to clarify that the new bonus calculation method first applies to the 2012 program year.

Subsection (h)(4)

Cities, OPUC, Public Citizen, SEED Coalition, Sierra Club, TX ROSE, and TLSC commented that any utility who fails to meet their goals should not be eligible for a bonus and requests the commission eliminate the potential for such a bonus to be awarded. Cities and OPUC proposed language modifying subsection (h)(4) to reflect the requirements that a utility exceeded both its demand and energy reduction goals, and remain under the costs caps in order to achieve a bonus. TX ROSE and TLSC requested the utilities be required to meet the goal of spending 10% of its energy efficiency budget on targeted low-income programs prior to being eligible to receive a bonus. They maintained that performance bonuses should be reserved for outstanding performance and never be permitted for substandard accomplishments, including failing to meet the low-income goal.

Further, Cities, OPUC, Public Citizen, TX ROSE, and TLSC commented that utilities that apply for and are granted a good cause exemption and who do not achieve their original program goals should not be granted a performance bonus. Joint Utilities, and separately TNMP, opposed the notion that a utility who requests a good cause exception from either the goal or the costs cap should be denied a bonus. Joint Utilities stated that a good cause exception is granted based on situations beyond a utility's control that prevent it from meeting a goal. They cited the study prepared by Itron for the commission that linked the ability for a utility to meet its goal with other factors such as climate, cus-

tomer mix, housing stock, and dominant type of air conditioning. All of these factors vary across service territories. TNMP commented that the suggestion that the bonus is not applicable in such a case appears to penalize a utility for requesting and demonstrating facts that support a good cause exception, which is based on commission determination that achieving either the goal or cost cap is not reasonably possible. Once the commission determines what is reasonably possible for the utility, it should be entitled to its full performance bonus based on the calculation provided for in the rule, the same as a utility operating against the statutory standard. It stated that to allow a utility to request a good cause exception, find the exception warranted, but then disqualify the utility equal opportunity to earn a bonus under the new goal is incongruous and unwarranted.

Joint Utilities recommended that rather than making a blanket determination of whether a utility is deserving of a bonus in the rule, the commission consider the availability of a bonus when the good cause exception is requested, or in the EECRF proceeding where the bonus is requested. This would allow the commission to look at the factors promoting the need to establish a lower goal.

Commission response

A good cause exception granted under subsection (e)(2) should not automatically disqualify a utility from receiving a bonus. The commission agrees instead with Joint Utilities and TNMP that a good cause exception is granted based on situations beyond a utility's control that prevent it from meeting its goal. In such cases, the bonus should be decided on a case-by-case basis, taking into consideration the factors that led to the exception being granted. As stated in response to the comments on subsection (e)(2), the commission previously approved the award of a performance bonus despite AEP TNC's request for a good cause exception to the goal calculation in Docket Number 39361. The commission rejects the language provided by OPUC and Cities and instead amends subsection (h)(4) to allow that the commission may reduce the bonus otherwise permitted under this section for a utility with a lower goal, higher administrative spending cap, or higher EECRF cost cap established by the commission, as specified in subsection (e)(2).

While the targeted low-income program is now tied to a percentage of the utilities' budgets, the commission disagrees with TX ROSE and TLSC that the utilities should be required to meet the goal of spending 10% of its energy efficiency budget on targeted low-income programs prior to being eligible to receive a bonus. As further discussed in response to comments regarding subsection (r), the commission believes it is appropriate that targeted low-income funds that remain uncommitted by July of a program year may be made available for use in the hard-to-reach program in order to further fund energy efficiency for low-income customers. Therefore, the commission rejects TX ROSE and TLSC's recommendation to require the utility to meet the limited 10% goal prior to being eligible for a bonus.

TX CHPI recommended language that would allow the commission to award a bonus if the energy and demand savings are not met, but the project portfolio contains measures not completed or with implementation times longer than one program year, such as for combined heat and power or thermal energy storage systems. Cities opposed TX CHPI and stated that cost-based utility ratemaking is premised on the "used and useful" principle. A utility is not permitted to earn a profit on facilities that are not used and useful in providing utility service. They commented that TX CHPI's proposal would provide a profit on facilities that are not held to this standard, which is contrary to PURA.

Commission response

The commission agrees with Cities and rejects TX CHPI's recommendation to allow a bonus if energy and demand savings are not met, but projects are still pending. As discussed in response to TX CHPI's comments on subsection (h), any performance incentive awarded is calculated based on the actual savings achieved during the prior program year. The commission declines to include forecasted savings for projects that will not generate savings during the program year for consideration in the applicable EECRF proceeding.

Subsection (h)(5)

Cities stated that it would support the proposed change to subsection (h)(5) should the commission choose to adopt a bonus calculation based on net benefits. They commented that the careful consolidation of how net benefits are calculated will help ensure that ratepayers will not have to shoulder artificially inflated performance bonuses.

Commission response

The commission appreciates Cities' comments. The commission has adopted the proposed bonus calculation based on net benefits proposed in subsection (h)(3) and therefore adopts subsection (h)(5) as proposed.

Subsection (i); Utility administration

OPUC stated that customer protections are needed when providing rate case expenses to the utilities and cities. It recommended including such expenses in the administrative cap calculations and provided conforming changes to subsection (i)(1)(F) and (G).

Commission response

The commission agrees with OPUC, in part, regarding the inclusion of rate case expenses in the cost caps. As previously stated in the discussion of proposed subsection (f)(8) (adopted subsection (f)(7)), the commission believes that rate case expenses incurred by the utility should be included within the administrative cost caps and amends subsection (i)(1)(F) accordingly. However, the commission disagrees with OPUC that municipal rate case expenses are within the utilities' control. The commission therefore rejects OPUC's recommendation and adopts subsection (i)(1)(G) as proposed.

Subsection (j); Standard offer programs

No comments.

Subsection (k); Market transformation programs

Cities and OPUC expressed concern regarding amendments to the proposed rule that would expand program eligibility to market transformation programs aimed at energy code adoption, implementation and compliance. Cities stated that energy codes are mandatory and ratepayer funds should not be used to meet objectives that must be met pursuant to law. Expending funds for such programs would contribute to free ridership problems and they expressed fear that it may be impossible to figure out whether codes achieve full compliance rates. RECA disagreed, stating that any actual programs proposed by utilities can be vetted by stakeholders after they are developed, and that the current proposed rule simply allows for the development, review and possible implementation of such programs if deemed effective.

OPUC commented that the energy efficiency program should not be providing incentives for complying with new codes as builders must already comply with applicable codes because it is the law. It stated that contractors should not be given an incentive from ratepayers to comply and modified proposed subsection (k) accordingly. RECA disagreed, stating that the proposed rule ensures that market transformation, and self-delivered programs that aim to promote early adoption or effective implementation and enforcement of energy codes are not categorically deemed ineligible simply because these energy codes may be mandatory in the legal sense. As with similar comments provided under subsection (e)(5)(C), it noted that it is widely known that compliance rates for mandatory energy codes are well below 100% even after being in place for years, and that in many locals, compliance and enforcement efforts might not exist. Further, statewide energy code updates in Texas typically lag the latest national model codes by several years, such as the two to three year gap between the availability of the 2009 IECC codes and the statewide effective date of the code. During the gap year, new homes were required to meet an older version of the code, potentially forfeiting substantial energy and peak demand savings over the useful lifetimes of the homes.

While Sierra Club stated that it supported proposed subsection (k), it recommended additional language requiring the utility programs to actually lead to better enforcement, compliance and installment of energy efficient buildings. It stated that an expression of support as stated in the proposed rule is not enough to count towards savings and peak demand reductions.

Commission response

The commission agrees with RECA and disagrees with Cities and OPUC regarding market transformation programs aimed at achieving compliance with energy and building codes. As discussed previously in response to comments regarding subsection (e)(5)(C), energy code compliance rates fall well below 100%. Therefore, the commission does not agree with Cities that encouraging compliance contributes to the free ridership problem or share their concerns that it may be impossible to determine whether full compliance with codes is achieved. Likewise, the commission agrees that encouraging early adoption can result in substantial demand and energy savings. The commission disagrees with OPUC that the language in subsection (k) should be struck from the rule and therefore declines to make the change. The commission also disagrees with Sierra Club that additional language is required for actual energy and demand savings to be achieved. Market transformation programs that are designed to express support for the most recent versions of energy conservation codes must still meet all the other requirements of this section, including providing measurable and verified savings. The commission adopts subsection (k) as proposed.

Cities cited concern that any savings claimed from behavioral modification type programs would be highly speculative and unreliable as no good method exists for deemed savings resulting from such programs. They stated that ratepayers need some certainty that what they are paying for is creating real energy efficiency savings and therefore suggested removing all sections of the rule that would allow behavioral modifications measures from being eligible for funding. Joint Utilities responded that Cities' recommendation was in direct contrast to PURA §39.905(d)(16), which provides that an energy efficiency program may include "energy use programs with measurable and verifiable results that reduce energy consumption through behavioral changes that lead to efficient use patterns and practices." They stated that the requirement for behavioral programs to have measurable and verifiable results is a safeguard that should address Cities' concerns. Further, the EM&V process should provide additional review of any savings claimed through behavioral programs. They requested that the commission reject Cities' recommendation to remove behavioral modifications from the measures eligible for funding under the rule.

Commission response

The commission understands the concerns regarding savings claimed from behavioral modification based programs, but rejects Cities' recommendation to remove all allowances for such programs from the rule. The commission agrees with Joint Utilities that PURA §39.905(d)(16) allows the commission to authorize utilities to offer programs with measurable and verifiable results that reduce energy consumption through behavioral changes that lead to efficient use patterns. Measurement and verification will be used by utilities to estimate savings for behavioral programs absent the availability of deemed savings. As stated in response to Pepco with respect to subsection (e)(3), behavioral programs are geared towards educating and motivating the customer in such a way that they modify when and how much energy they consume.

Pepco stated that the proposed rule missed the opportunity to address more permanent peak shifting through thermal storage. It noted that with unbundling, the benefits of thermal storage were split between generators, retailers, utilities and customers, and that the customer benefit alone is insufficient to drive customers to invest in thermal storage. It recommended that the commission direct utilities, through the rule itself or through additional guidance, to develop a statewide market transformation program promoting on-site thermal energy storage. It commented that thousands of MWs could permanently and quickly be shifted off peak, reducing the need for new peak capacity.

Commission response

As discussed in response to comments filed regarding subsection (c)(14), the commission believes that providing incentive payments under the energy efficiency program to promote thermal solution at generation facilities is beyond the scope of the rule. The commission maintains, with support from the statute, that the goal of the energy efficiency program is to reduce demand, not to increase the efficiency of generation plants. To the extent that thermal storage could be installed at an eligible customer's premise and be classified as captured waste heat, steam, or cold from cogeneration technologies, then the project could fall under the classification of a combined heat and power project, which is currently eligible for inclusion in energy efficiency programs, as outlined in subsection (m)(1)(E).

Subsection (l); Self-delivered programs

TX ROSE and TLSC stated that the proposed rule fails to define the term "self-delivered program" or determine when a self-delivered program is allowed and how the commission would make that determination. They recommended language amending proposed subsection (l) to clarify that a self-delivered program is a program made directly available to customers by a bundled utility instead of through an energy efficiency service provider, and a utility may offer a self-delivered program upon a finding by the commission that the self-delivered program does not violate §25.343 and is necessary to provide energy efficiency service to customers in the service area.

Joint Utilities requested that the language proposed by TX ROSE and TLSC be rejected. They stated that the language offered by TX ROSE and TLSC fails to distinguish between utilities in an area in which customer choice is offered and those in an area in which customer choice is not offered. The utilities in an area in which customer choice is not offered have lower regulatory requirements when offering self-directed programs under SB 1125.

Commission response

The commission agrees with Joint Utilities and rejects the language proposed by TX ROSE and TLSC regarding self-delivered programs. PURA §39.905(h)(1) allows utilities in areas not open to competition to offer self-delivered programs and subsection (h)(2), pursuant to PURA §39.905(h)(2), allows such utilities to develop new programs other than standard offer or market transformation programs with commission approval. PURA §39.905(i) requires a utility in an area open to competition to petition the commission for approval after a contested case hearing in order to offer a self-delivered program, and the self-delivered program may be offered only in a rural area. With this direction, the commission has modified the rule throughout to incorporate self-delivered programs, including a definition of such programs in subsection (c)(52).

Subsection (m); Requirements for standard offer, market transformation, and self-delivered programs

TX ROSE and TLSC commented that the intent of the original energy efficiency rule was to design programs that would operate in the competitive market and gradually phase out utility involvement in energy efficiency. Yet, they stated changes to the rule are having the opposite effect as utilities are being required to broaden the scope of their programs to include incentive payments for behavioral measures, energy audits, and program advertisement. They commented that the addition of self-delivered programs seems to further return to the model of utility owned and operated energy efficiency that was previously rejected.

Commission response

PURA §39.905 specifically allows such incentives under subsections (a)(5), (d)(16) and (j), regarding educational materials, behavioral programs, and energy audit programs, respectively. Further, as discussed above, PURA §39.905(h) and (i) allow the utilities to offer self-delivered programs directly to customers in certain circumstances. Thus, these programs are expressly contemplated by PURA §39.905.

Subsection (m)(1)

TX ROSE and TLSC recommended that subsection (m)(1) of the proposed rule should include a provision requiring the contractor to pass utility incentives through to the customer in all cases where residential customers are investing their own money for an eligible energy efficiency measure. They noted that the customer has no choice but to pay the costs of the programs through rates and therefore should receive the incentive and provided language accordingly.

Commission response

As explained with respect to subsection (g), the commission does not believe that a contractor should be required to pass the full utility incentive through to a customer. The commission, therefore, rejects TX ROSE and TLSC's proposed changes to subsection (m)(1).

TX ROSE and TLSC stated that the hard-to-reach (HTR) program was initially designed to provide customers with incomes up to 200% of the federal poverty guidelines with a comprehensive energy efficiency program at no charge or a very low cost. It came to their attention that HTR contractors are charging customers and that the utilities have no limits on how much a contractor can charge HTR customers for the services. They recommended an additional provision to proposed subsection (m)(1), asserting that all programs serving low-income customers, including the HTR program, shall be provided to the customer at no cost.

Commission response

HTR programs have different requirements and purposes than the targeted low-income programs, which must comply with the same requirements as federal weatherization assistance programs. The HTR programs are provided to customers who meet the same income guidelines as for targeted low-income programs. The customer is informed of certain measures that would improve the efficiency of the customer's home. In some cases, a measure such as attic insulation may be provided at no cost to the homeowner, depending on the amount of insulation currently installed in the customer's home. In other instances, the customer is informed that there is an incremental cost that will be borne by the customer, and the customer is given the option of proceeding with the installation or rejecting the project. This program installs measures that are included under the utilities' residential standard offer programs, but there are energy efficiency service providers who focus on customers that may qualify for the HTR programs. This program design results in the utilities operating HTR programs that are much less expensive on a cost per kW basis than targeted low-income programs, and therefore allows utilities to provide a greater number of incentives for energy efficiency measures compared to the targeted low-income programs.

The targeted low-income programs are markedly different from the HTR programs. Energy efficiency service providers first conduct an energy audit to determine which measures would improve the efficiency of a home. Each measure on the list is ranked in terms of the Savings-to-Investment Ratio (SIR). All measures with an SIR of 1.0 or greater qualifies for installation, up to a total of $6,500 per home. While this relieves the homeowner of any financial obligation, it results in fewer homes being served and a much greater cost per kW.

Therefore, the commission does not feel it is good policy to require the utilities to administer the HTR programs under the same standards as the targeted low-income programs, as the HTR programs must meet the cost-effectiveness standard under subsection (d) while targeted low-income programs are subject to the SIR defined in subsection (r).

Subsection (m)(1)(E)

TX CHPI proposed modifying the rule to allow incentives paid for distributed generation, geothermal, heat pump, solar water heater and combined heat and power technologies to be paid for the first two megawatts of the installed system.

Commission response

Subsection (m)(1)(E) already allows for utility programs to incentivize the use of distributed renewable generation, geothermal, heat pump, solar water heater, and combined heat and power projects up to ten megawatts. Therefore, the commission believes TX CHPI's proposed change is unnecessary.

Subsection (m)(1)(F)

Pepco, Sierra Club, TX ROSE, and TLSC expressed concern with allowing the baseline to be dropped to reflect actual or typical efficiency savings. TX ROSE and TLSC stated that allowing a baseline to be established using typical or actual current features is inconsistent with other provisions in the rule regarding baselines and measurement and evaluation processes. Pepco stated that while it would benefit from receiving credit for the actual savings if the incentives offered were also based on actual savings and thereby increased; allowing the baseline to be dropped to reflect actual or typical efficiency could more than double the credit for any given project. Pepco and Sierra Club commented that by allowing a utility to take credit for the actual improvement of a measure rather than the marginal improvement achieved over the current code baseline, utilities could reduce by half what must be acquired to meet their energy efficiency goals, which does not seem necessary given the current levels of the goals. Sierra Club stated that the changes made to proposed subsection (m)(1)(F) need clarification. Pepco, TX ROSE, and TLSC recommended that the baseline calculations in proposed subsection (m)(1)(F) be rejected.

Commission response

The commission agrees with the comments of TX ROSE and TLSC that this subsection may be read to be inconsistent with the definition of baseline in subsection (c)(2) and the calculation of the baseline in subsection (q)(8). In contrast to the comments of Pepco and Sierra Club, the commission believes that there may be instances when the baseline cannot be determined based on a current code, so it is necessary to provide further delineation of the baseline, as stated in subsection (q)(8).

As stated in subsection (q), TX ROSE and TLSC state that changes to proposed subsection (m)(1)(F) may result in potential conflicts with language proposed in subsection (q)(8). Subsection (q)(8) more clearly defines the calculation of the baseline, and therefore, the commission deletes subsection (m)(1)(F) and re-designates subsequent subparagraphs accordingly.

Subsection (m)(1)(G)

Given the discussion under proposed subsection (m)(1)(F), OPUC, TX ROSE, and TLSC recommended that proposed subsection (m)(1)(G) be deleted as well.

Commission response

While the commission believes that subsection (m)(1)(F) should be deleted in favor of the more prescriptive language proposed in subsection (q)(8), the commission disagrees with OPUC, TX ROSE, and TLSC that subsection (m)(1)(G) should be deleted as well. As previously discussed in response to comments regarding proposed changes to subsection (k), the commission believes that utilities should be allowed to offer market transformation programs designed to promote compliance with building and energy codes. Subsection (m)(1)(G) provides conforming changes to the amendments adopted under subsection (k), and therefore the commission adopts the provision as proposed.

Subsection (m)(1)(H)

TX ROSE and TLSC stated that the information listed in proposed subsection (m)(1)(H) should be mandatory rather than an optional utility requirement. They commented that there is no excuse for a contractor to not provide this information to the customer.

Commission response

The commission disagrees with TX ROSE and TLSC's assertion that the information proposed under subsection (m)(1)(H) should be mandatory and declines to make the proposed changes. The information that may be required under the provision would be provided at the utility's request to the utility, not the customer. Each utility should be given some latitude in defining the requirements for their service providers and contractors.

Subsection (m)(2)(F)

TX ROSE and TLSC stated that a utility that finds poor performance in a contractor's work should be required to limit or disqualify the contractor from participating in a program until satisfactory changes and practices are adopted by the contractor.

Commission response

The commission disagrees with TX ROSE and TLSC that a utility should be, at any point, required to limit or disqualify a contractor. Utilities should continue to have the discretion to disqualify contractors on a case-by-case basis, according to their own specific procedures.

Subsection (m)(5)

Cities, ERCOT, and TIEC expressed concern with proposed subsection (m)(5). NAPP supported the language as proposed.

ERCOT expressed concern that subsection (m)(5) could be read to establish an obligation on ERCOT's part to compensate providers for energy supplied or demand response supplied to the grid. It commented that its protocols do not allow for such compensation and recommended the rule be clarified to remove any unnecessary confusion. It provided language modifying the rule to state that the qualified scheduling entity (QSE) representing a provider is not prohibited from receiving revenues from energy sold in ERCOT energy markets in addition to any incentive for demand reduction offered under a utility load-control standard offer program. REP Coalition agreed with ERCOT that proposed subsection (m)(5) should be modified to clarify that payments will be made to a QSE for any revenues settled in the ERCOT market. EnerNOC also agreed, commenting that the ERCOT language makes clear that just because a provider receives an incentive for a demand reduction call it does not prohibit the provider's QSE from also offering energy for sale in the ERCOT market.

TIEC stated that any utility load management program that would emulate or would constitute subsidized participation in the ERCOT energy or ancillary services markets should be removed from the programs. They stated that in no event should the same load be counted toward a utility program and be simultaneously allowed to participate in the ERCOT market. EnerNOC agreed with TIEC that the language should not be interpreted as allowing a provider to receive compensation from both a utility and ERCOT for the same demand reduction.

NAPP agreed that a provider should not receive incentives for both programs when the programs are intended for the same purpose or provide the same benefit. It stated that utility programs duplicate the reliability purpose of the ERS program, and ultimately, ERCOT should manage all of the reliability resources. It noted that ERCOT could learn from the utility programs' recent ability to attract participation. Further, it commented that the utilities should always be able to initiate load management programs that allow them to accomplish other goals appropriate to their missions, such as deferring transmission and distribution costs or relieving local congestion. Such programs provide direct benefit to the utility, and therefore, they should be financed out

of their own rate revenues rather than receive guaranteed rate recovery form the efficiency programs. If the programs are continued, it stated that the commission could view the programs as a potential tool for piloting demand response programs for new customer classes or end-use applications. Even with ERCOT's new ability to conduct pilots, it commented that the utilities may have more flexibility to test new concepts or experiment with approaches prior to the programs being picked up by ERCOT and adopted as a full program. At that time, a utility should cease to offer the same program.

Commission response

The commission appreciates the comments of ERCOT, REP Coalition, and EnerNOC regarding a QSE's ability to sell energy into the ERCOT market and receive an incentive for demand reduction from a utility and adopts ERCOT's suggested changes to this subsection. The commission also agrees with ERCOT, TIEC, EnerNOC, and NAPP that a provider should not receive payments from both ERCOT and a utility if its demand reduction provides the same benefits or serves the same purpose for both programs. As discussed in response to comments filed in regards to the first preamble question, the commission believes the utility load management programs provide a continued value. PURA §39.905(d) grants the commission the authority to consider the ability of a program to reduce costs to customers through several factors, including the relief of congestion and subsection (d)(6) specifically mentions energy management and demand response programs. Approved energy efficiency programs are subject to rate recovery through the EECRF. The commission agrees with NAPP that the utility programs are an important and useful tool for offering demand response pilot programs and testing new end-use applications. CenterPoint has already begun offering a REP pilot standard offer program this year that provides incentives towards the cost of installing direct load control equipment, smart thermostats, and in-home devices.

TIEC stated that the last sentence in proposed subsection (m)(5) is unclear and unneeded. They noted that any ERCOT market participant that owns or has previously contracted for an energy supply may already sell that energy into the wholesale market if it is not being used. They expressed concern that including the specific language in the rule may inadvertently create issues for any contractual agreements that do not allow a provider to retain revenues from energy sold into the wholesale market, such as if the provider were obligated to pass revenues through to a third party. They also stated that they opposed any implication that the language somehow supports double-payment for demand response, as the issues have already been discussed at ERCOT as part of the discussion on Loads in SCED.

Cities proposed language clarifying that an energy efficiency service provider is allowed to receive payment for demand reduction offered under both utility and ERCOT programs only to the extent that the payments do not involve the same interruption event. EnerNOC requested that the commission reject Cities' proposed modifications. It stated that it does not support duplicative compensation, but Cities' language would prohibit a provider from participating in a load management program as well as serve distributed generation customers who are allowed to sell energy at ERCOT under the ERS program.

NAPP and REP Coalition disagreed with Cities and TIEC that the last sentence of proposed subsection (m)(5) should be amended or deleted. REP Coalition stated that it does not endorse any double-dipping of payments for demand response, but that it reads proposed subsection (m)(5) to refer to the ability of a provider to receive an incentive from the utility, which acts as a capacity payment for load available for interruption, and to receive revenue from demand response economically dispatched through ERCOT, which acts as an energy payment based on a providers' price to interrupt. It stated that this allows for two separate revenue streams that are legitimately available to the provider with each type of payment serving a distinguishable purpose rather than a double payment for the same demand response. NAPP stated that while an energy payment in the energy-only market may implicitly include some capacity value, an exact amount or method of calculating the energy payment can be developed in the ERCOT stakeholder process. It commented that this would allow smaller customers to participate in demand response in much the same way as many industrial customers currently do.

Further, NAPP believed that loads providing benefits in addition to reliability benefits should be able to receive compensation from both ERCOT and the utility. The purpose of the utility program would be distinct from the ISO program and if the load is called from both programs and curtails as promised, the load would be considered in compliance with both programs. It provided language in proposed subsection (m)(5) that would accommodate such a concept.

Commission response

The commission appreciates the comments of Cities, EnerNOC, NAPP, REP Coalition, and TIEC regarding potential double-dipping of payments for demand reduction. The commission clarifies that the last sentence in subsection (m)(5) allows a load management provider to receive an incentive for capacity provided under the utility program and payment for any energy sold on their behalf in an ERCOT market.

The commission amends subsection (m)(5) to state that a service provider is not permitted to receive incentives for the same demand reduction benefit for which it is compensated (through a capacity payment) by an independent organization, independent system operator, or regional transmission operator. The commission further amends the last sentence of the subsection to clarify that qualified scheduling entities are not prohibited from receiving revenues (through an energy payment) from energy sold in the ERCOT markets. The commission declines at this time to adopt language regarding specific demand response, energy, ancillary service, or capacity programs. The commission believes that a global approach to assuring that resources do not receive duplicative compensation for the same curtailment should be undertaken through the ERCOT stakeholder process. The commission encourages the utilities and ERCOT staff to explore instances when a load participating in the load management program can provide a distinct and separate benefit through the ERCOT market during a contract period. The rule as adopted gives ERCOT the flexibility to adopt protocol and market guide amendments through the ERCOT process rather than the commission developing a requirement through this rule for ERCOT to undertake such an effort.

The commission appreciates the comments of TIEC. The commission has addressed its concerns about the last sentence of the rule subsection by clarifying that a QSE is not prohibited from receiving revenues from energy sold in the ERCOT markets, rather than the energy efficiency service provider being allowed to receive revenues as was originally proposed.

Subsection (m)(6)

REP Coalition and Walmart supported proposed subsection (m)(6). CenterPoint, EDF, EnerNOC, and Sierra Club encouraged the continuation of utility-administered load management programs. TIEC did not oppose programs with a separate and valid utility purpose from continuing as utility-based programs.

REP Coalition commented that proposed subsection (m)(6) is structured similarly to PURA §39.905(b)(7), as both impose a requirement promoting the full participation of load resources in ERCOT's competitive energy markets, conditional on certain qualitative prerequisites. Neither provision is an all-or-nothing proposition.

Walmart stated that the proposed rule is appropriate in shifting costs from ratepayer-funded demand response to market-based options as they become available. Walmart commented that the proposal is flexible enough to ensure customers seeking to participate in load management programs will continue to have options equivalent, or where ERCOT offerings do not replicate those of the utility, the same as those options currently enjoyed. REP Coalition agreed, in part, providing language to address the scenario in which a utility's load management program does not transition to the ERCOT wholesale market, such as if one or more programs cannot be feasibly integrated within the framework of the competitive energy market in the short-term. It specifically acknowledged obstacles residential and small commercial load might face with transitioning to ERCOT markets, but stated that any exclusion should not be permanent.

REP Coalition noted that the Brattle Report indicates the efficient integration of price-responsive load in the ERCOT market is unlikely feasible in the short-term and loads in ERCOT are not presently capable of expressing price-sensitive offers in SCED. The report also noted that feasible integration of load will entail something more than the completion of the Loads in SCED initiative. It stated that it views the feasible integration of loads envisioned by proposed subsection (m)(6) as a long-term objective and that the Brattle Report should alleviate many of the concerns expressed by parties in opposition of proposed subsection (m)(6). It maintained that the continued operation of the programs is not threatened in the short-term and may remain unaffected for a significant period or longer. It stated that the integration of loads proposed in subsection (m)(6) remains an important objective to promote more robust and comprehensive demand response, which is critical to the long-term success of the ERCOT wholesale market.

TIEC maintained that any utility program that is being administered and deployed like an ERCOT ancillary service, or in a way that mimics market participation, should be discontinued and the load management activity provided exclusively through the market. They stated that regulated utilities should not be in the business of offering subsidized "shadow" programs that mimic market participation without the strict requirements of actual ERCOT market participation. They noted that many utility programs are deployed during ERCOT Energy Emergency Alert (EEA) 2, which is the same trigger as ERS, and are in some cases, according to ERCOT comments, competing with ERS for load participation. They commented that PURA §39.001(c) explicitly prohibits utilities from participating in the competitive market.

Sierra Club stated that while the language proposed in subsection (m)(6) is satisfactory, it cautions against the assumption that market-based programs alone will serve to reduce peak demand to the full potential. EDF stated that it believes utility programs and the ERCOT market-based programs are complimentary rather than mutually exclusive, and the potential for load management programs to provide ERCOT with a substantial amount of reliable resources far exceeds both current programs' participation rates. It commented that given concerns regarding resource adequacy it seems shortsighted to plan a phase-out of one type of program in favor of another, especially given the current low level of load management within ERCOT.

CenterPoint stated that load management programs are a vital component within its overall energy efficiency portfolio, producing approximately 100 MW of savings in 2010 and 2011. It stated that with an increase in load management efforts in light of resource adequacy concerns, its 2012 program have been designed to achieve approximately 200 MW of savings. The programs are the most cost-effective programs in CenterPoint's portfolio, and if phased out, it would need to increase energy efficiency spending beyond the costs caps by 2015 in order to continue meeting its goals. It stated that without the load management program, overall portfolio costs per kW would increase approximately 150% to nearly $650 per kW.

REP Coalition also commented that load management programs grandfathered under PURA §39.905(a)(6) may be exempt from the transition and integration requirements proposed as a matter of legal infeasibility and that their continued deployment could considerably benefit the market during emergency conditions, as long as it does not dampen or reverse price signals in the competitive market.

EnerNOC commented that it supports allowing utilities the flexibility to continue to provide load management programs even after loads are able to participate in the ERCOT energy market. While it understood that proposed subsection (m)(5) and (6) intend to provide that flexibility, it is concerned with the use of the terms "feasible" and "feasibility," as they could be interpreted as more prescriptive. It recommended that the commission replace the terms to reflect that the programs will "voluntarily" integrate to the ERCOT market.

REP Coalition disagreed with the language proposed by EnerNOC and stated that something more than voluntary integration of loads is required to meet the objective of price-setting demand response. It stated that proposed subsection (m)(6) does not require ERCOT to administer these utility load management programs, rather that the loads participating in a utility program will transition upon their feasible integration into the competitive energy market. Any participation in the competitive energy market is voluntary, and to the extent that a utility facilitates the loads' voluntary integration through the load management programs, the programs will reside at the utility rather than ERCOT.

REP Coalition stated that any remaining utility programs should be deployed concurrent with ERCOT's deployment of load resources obligated to provide ERS. It also noted a need for ERCOT to implement a mechanism ensuring that deployment pursuant to a retained load management program does not cause a price reversal or otherwise negatively impact wholesale market prices during the deployment period. The mechanism should cover the full duration of the deployment. It cited discussion of such a mechanism at ERCOT in the "0 to LSL" issue. It stated that ultimately loads that transition need to be dispatched based on price, rather than the same criteria as ERS, but performance standards for non-transitioning load management should be comparable to ERS and provided modifications to proposed subsection (m)(6) to clarify this intent.

EnerNOC stated that REP Coalition's proposed modifications requiring utility programs to be deployed when ERCOT deploys ERS are unnecessary. It stated that ERCOT already has an MOU regarding coordination with the utility programs and it is concerned that REP Coalition's proposal would undermine additional operational benefits the programs provide independent of ERCOT operations.

TIEC proposed modifying subsection (m)(6) to assert that loads that participate in the ERCOT energy or ancillary services markets may not participate in utility load management programs. They commented that this change is consistent with their comments under the second preamble question.

REP Coalition stated that TIEC's amendments concerning double payments should be rejected. It maintained that the incentive payment for participating in the load management program and the payment received for energy sold through the ERCOT real-time market is separate and distinguishable.

Commission response

The commission appreciates REP Coalition and Walmart's support of the market-based competitive energy programs and economic dispatch. As discussed at length in response to comments filed regarding the first preamble question, the commission believes that many loads will voluntarily migrate to ERCOT programs such as ERS and Loads in SCED when it is launched due to more attractive pricing in those markets for load. The commission continues to support and prefer market-based economic dispatch of resources. However, the commission disagrees with REP Coalition, TIEC, and Walmart that the commission should require a transition tied to a specific trigger. The commission agrees with comments filed by ERCOT regarding the first preamble question that the Loads in SCED initiative would not be an appropriate trigger for a transition. Furthermore, some loads may not be able to participate in ERCOT markets due to technical requirements. Customers should choose the appropriate demand response, energy, ancillary service, or capacity program for their load. The customer should consider whether any integration of its load into the ERCOT markets is feasible. The commission encourages the utilities to work with ERCOT, energy efficiency service providers, and customers to determine if load management participants can be best served by programs in the ERCOT markets. The commission amends subsection (m)(6) to state that utilities offering load management programs shall work with ERCOT and energy efficiency service providers to identify eligible customers and shall integrate such loads into the ERCOT markets to the extent feasible.

The commission agrees with CenterPoint, EDF, EnerNOC, Sierra Club, and TIEC that the utility load management programs should continue for small, less sophisticated customers and should continue to the extent they serve a separate purpose or are able to provide benefits such as targeted congestion relief to individual utility systems. Small, less sophisticated load, such as residential and small commercial customers, may not have access to a feasible means of participating in the ERCOT market for several years. The commission further amends subsection (m)(6) to state that integration shall not preclude the continued operation of utility load management programs that cannot be feasibly integrated into the ERCOT markets or that continue to provide separate and distinct benefits.

The commission has addressed TIEC's concerns regarding potential double payment in response to comments filed regarding subsection (m)(5). The commission has also addressed REP Coalition's concerns regarding the utility programs' deployment concurrent with ERS and reverse pricing signals in response to comments filed regarding the first preamble question. The commission, therefore, rejects the language proposed by REP Coalition.

TX ROSE and TLSC recommended the rule include a reporting requirement for the utilities and ERCOT to report to the commission every six months on the progress of allowing loads to participate in the energy market and a timeline for transitioning the load management programs to ERCOT. They stated that the transition could be accomplished by December 31, 2014. REP Coalition disagreed, stating that the high-level directive provided by subsection (m)(6) is sufficient and that the rule need not specify the process or schedule for transitioning load management programs to ERCOT's SCED system. It commented that the provision provides the utilities, ERCOT, and interested market participants the flexibility to work on the details of the transition and integration and is consistent with the general approach taken by the commission in other rules addressing ERCOT's administration of similar services, such as ERS.

Commission response

The commission agrees with REP Coalition that TX ROSE and TLSC's recommendation to include specific reporting requirements regarding the transition of load management programs is unnecessary. The Loads in SCED initiative is in the beginning development stages and significant stakeholder input will be required before any such mechanism is available in the ERCOT market. Adopting a specific timeline for the transition is unrealistic at this point. Commission staff has been involved in the discussions at ERCOT involving Loads in SCED and will continue to participate and follow developments in the project as they occur.

Subsection (n); Energy efficiency plans and reports (EEPR)

Subsection (n)(2)(I)

TX ROSE and TLSC commented that information needed to evaluate programs, especially low-income programs, is not provided by the utilities and their contractors. They recommended amendments to proposed subsection (n)(2)(I), requiring the utility budget information reported in the EEPR to include a break-out for targeted low-income energy efficiency customers.

TX ROSE and TLSC also recommended a new provision to proposed subsection (n)(2), which would require the EEPR to contain a table illustrating how incentives are to be passed through to customers under each energy efficiency program, except those for targeted low-income customers. They noted that the HTR program information should instead show any amount that was charged to the customer over and above the incentive paid to the contractor by the utility.

Commission response

The commission disagrees with TX ROSE and TLSC that additional reporting information for low-income programs is needed in the EEPR. The EEPRs filed by the utility are already required by subsection (n)(2)(I) to break-out programs by customer class, including HTR customers and any other set-asides. The utilities, therefore, are already providing a break-out for low-income programs in the EEPR. Based on the response provided under subsection (g), the commission rejects TX ROSE and TLSC's recommendation to require the utility to illustrate how incentives are to be passed through to customers.

Subsection (o); Review of programs

TX ROSE and TLSC stated that they anticipate that the EECRF process will afford intervenors the opportunity to evaluate a utility's programs and recommended that this subsection be modified to expressly state that the EECRF is the proper forum.

Commission response

As discussed with respect to subsection (s), the commission is modifying the role of the Energy Efficiency Implementation Project (EEIP) to allow a more complete review of new programs and significant changes to existing programs prior to implementation. This allows commission staff and stakeholders to focus on the reasonableness of expenses incurred for administering the programs during the EECRF proceedings. Therefore, the commission declines to adopt TX ROSE and TLSC's suggested change.

Subsection (p); Inspection, measurement and verification

TX ROSE and TLSC believed that every program should be required to follow the same protocol. Therefore, they recommended that the phrase "or a protocol approved by the commission" be deleted. They also stated that the new provisions added to address behavioral programs should be modified so that measures installed under these programs are verified before payment is made. Likewise, they suggested that subsection (p)(3), which requires a customer's signature verifying the measures were installed, provide an alternative standard for behavioral programs.

Opower opposed TX ROSE and TLSC's comments that behavioral programs should be evaluated using approved industry standards for installed rather than behavioral measures. It stated that these programs are fundamentally different and require different approaches. It asserted that behavioral programs continue to be implemented over time and messages and interventions must be delivered consistently to encourage behavior that reduces consumption. It believed behavioral programs should be treated according to industry best practice and offered examples such as the DOE consensus report, which recommends the use of random controlled trials, ex-post measurement, and the panel data method analysis for evaluation of energy savings. *See Evaluation, Measurement, and Verification (EM&V) of Residential Behavior-Based Energy Efficiency Programs: Issues and Recommendations,* the State and Local Energy Efficiency Action Network (May 2012). It added that this approach is endorsed by all parties to the document and urged the commission to adopt this best practice for the evaluation of behavioral programs.

Opower also cautioned that TX ROSE and TLSC's comments regarding the creation of a single protocol, passing through all incentives, and treating behavioral program service providers the same as all other service providers would be counter to the goal of maximum energy efficiency at the least cost. It stated that while on the surface their suggestions may appear to bring uniformity to all programs doing so could prevent implementation of new programs that do not emulate the existing programs. To support its position, Opower countered TX ROSE and TLSC's comments that behavioral program service providers should be reimbursed once work is completed. It pointed out that the proposed rule would allow a utility to reimburse a behavioral service provider on an incremental basis, which is consistent with industry best practices; however, the utilities would still need to verify that the work is completed.

Commission response

While there are currently no behavioral programs being offered in the areas open to competition, there are potential service providers interested in offering these programs. Some programs are set up in such a manner that customers in the participant group would receive monthly mailings that suggest ways a customer could reduce their usage, ranging from changes with very little cost to installation of new appliances. In other programs, usage for a group of consumers with similar-sized homes and usage patterns is continually compared to the participant's monthly consumption to try to promote changes in consumption. The reduction in consumption is measured by comparing the baseline electricity usage, provided by a control group, with the participant group's consumption. One of the first academic journal articles evaluating the effectiveness of the behavioral programs demonstrated that the average program reduces energy consumption by 2.0%. *See* Allcott, H., *Social Norms and Energy Conservation, Journal of Public Economics (2011).* Utilities offering a behavioral program would claim similar savings and count those towards their energy and demand reduction goals. In addition, Sharyland plans to offer a behavioral pilot program in 2013 to its customers in the areas not open to competition and expects savings ranging between 1.5 and 3%.

The commission agrees with Opower that the behavioral programs vastly differ from the traditional programs currently offered by the utilities. The commission also believes that it may be appropriate to consider other protocols and best practices beyond the IPMVP and the DOE consensus report for behavioral programs and would like to retain the flexibility to consider other sources. Therefore, the commission declines to make the changes suggested by Opower, TX ROSE, and TLSC.

Further, due to the unique relationship between energy efficiency service providers offering behavioral programs and customers participating in these programs, it may be difficult to ascertain which measures were installed based on the mailings received by the customer. However, through bill analyses it can be determined that the customer's overall usage has declined. The utility would be responsible for conducting an inspection at some future date, and the verified savings can be captured by the utility to meet its demand or energy goal. Therefore, the commission agrees with Opower that behavioral program service providers may receive incentives on an incremental basis.

Subsection (q); Evaluation, measurement and verification (EM&V)

Public Citizen and SEED Coalition supported the addition of an EM&V process and added that it is likely to result in significant improvements and an increased level of transparency, including uniformity among the various utilities' programs. OPUC stated that it is a proponent of the framework proposed in this subsection. Likewise, Pepco supported evaluation of the programs, but urged the commission to use the reports to improve the programs on a prospective basis, rather than penalizing the utilities.

Commission response

Concerning Pepco's comments, the results of the EM&V process will be used to make improvements to programs for future program years, but may also be used in evaluating the reasonableness of a utility's expenses recovered through its EECRF.

Joint Utilities believed that the addition of this section increased the complexity of the rule and included some additional details

that may be best included in the TRM or the commission's request for proposal (RFP) and contract with the EM&V contractor. They were specifically concerned that references to certain external documents and possible approaches can not only become outdated, but it would be more difficult to make changes to the rule in response to frequent EM&V changes. Moving appropriate sections of subsection (q) to other documents allows the commission the flexibility to make changes in a more efficient manner as the situation warrants. CLEAResult, Public Citizen, and SEED Coalition offered their support for Joint Utilities' suggestion to simplify the EM&V program requirements outlined in the rule to maintain flexibility in conducting the evaluations. OPUC agreed with the Joint Utilities, but went a step further to add that the sections removed from the rule could be moved to the TRM that is approved by the EEIP, which ensures that the stakeholders can participate in the approval process.

Commission response

The commission agrees that details of the EM&V activities should be removed from the rule to allow for more flexibility as circumstances change. Specifically, the commission has responded to the comments by deleting language that describes the principles that guide the EM&V activities (previously included in subsection (q)(2)), outlines plans (previously included in subsection (q)(4)), including the requirement to review programs from prior years and reports (previously included in subsection (q)(7)) to be provided by the EM&V contractor, the associated schedule (previously included in subsection (q)(9)), and specific impact evaluation activities (previously included in subsection (q)(5)). The commission believes this information is more appropriately included in the scope of work included in the RFP and contract documents or the TRM. The commission has also made clarifications throughout this subsection.

Joint Utilities commented that subsection (q) does not clearly state whether the burden falls on the utilities to continually update deemed savings values and installation standards, or if the EM&V contractor will now be responsible for making these updates. Alternatively, the utilities could be required to make the necessary updates and the EM&V contractor would review any petitions filed by the utilities. They requested clarification on this issue.

Commission response

With regard to Joint Utilities' request for clarification, utilities would still be responsible for filing petitions to revise or establish new deemed savings pursuant to subsection (i)(4). The approved deemed savings will be included in future updates to the TRM. The responsibilities of the EM&V contractor in subsection (q)(4)(C) indicates that the TRM is to be prepared by the EM&V contractor and subsection (q)(6)(B) indicates that the EM&V contractor will review the TRM at least annually to determine if an update is required. In addition, subsection (q)(6)(B) indicates that the utilities and other stakeholders can request changes to the TRM at any time for review by the EM&V contractor (as directed by commission staff). The commission expects that the utilities will be providing TRM updates for consideration, as they feel appropriate.

CLEAResult remained concerned that utilities could be penalized for offering new programs and measures. It believed that the regulatory process should include a feedback loop designed to improve programs and provided a diagram for the EM&V process that starts with the EEIP process and TRM, which then feeds into program and measure implementation. The evaluation process would include a review of program designs and analysis of savings per measure and program. The EM&V contractor would use this information to make recommendations for improving the programs and any necessary changes to the deemed savings.

Commission response

With respect to the feedback loop indicated by CLEAResult, the stated EM&V objectives of subsection (q) already include providing feedback and input into the planning process; therefore, the commission believes that further guidance is not required.

ERCOT requested two minor revisions to this subsection. First, ERCOT stated that it does not have authority over planning or siting of proposed generation resources and suggested that subsection (q)(1)(C) be modified to accurately reflect ERCOT's role by removing the term "energy resource". However, it did not object to the EM&V contractor providing input into its planning activities. Second, it proposed to supplant the term "demand response" found in subsection (q)(1)(A) with the term "load management," which is used throughout the rule.

Commission response

The commission appreciates ERCOT's suggestions and has made the requested changes in subsection (q)(1).

REP Coalition expressed concern about protecting customer data from disclosure during an EECRF proceeding. It stated that if the additional services to be provided by the EM&V contractor included providing experts for hearings under subsection (q)(4)(G), all documents reviewed or possessed by the EM&V contractor could be subject to discovery if the contractor serves as the testifying expert in an EECRF. It added that the commission could try to protect some of the proprietary information from disclosure, but there is no guarantee that this information would ultimately be protected.

Commission response

The commission considers the privacy of customer information to be a serious issue, and has crafted subsection (q)(11) accordingly. However, the commission and parties engaged in litigated matters before the commission frequently encounter situations in which confidential and highly sensitive information is included in discovery and even within the evidentiary record. The commission believes that the standard procedures, including protective orders, that are typically employed to protect such information will continue to be sufficient to protect information that may be reviewed or used by the EM&V contractor. Therefore, the commission declines to adopt the language offered by REP Coalition to limit the EM&V contractor's release of data.

TX ROSE and TLSC questioned whether the impact evaluation activities outlined in subsection (q)(5) are consistent or should be consistent with the IPMVP. With regard to the TRM discussed in subsection (q)(6), they felt that the current wording of subparagraph (A) may make it difficult for an EM&V contractor to recommend changes to the information used to develop the TRM. They also argued that staff cannot be delegated the authority to approve the TRM and to set baselines, as contemplated in subsection (q)(6) and (10). While they agreed that staff could make recommendations, the commission should adopt any substantive procedures relating to EM&V. They also disagreed with the proposal to apply the changes in an updated TRM prospectively, and argued that it may be appropriate to adjust demand and energy savings for prior years. They further suggested that the commission should determine whether or not historical adjust-

ments are appropriate. With regard to the definition of baseline in subsection (q)(10), they suggested that the baseline should refer to what measures are installed in the absence of a program not the equipment that is being replaced. They also proposed modifications to subsection (q)(11) that would require the commission to issue an order directing the utilities to implement certain recommendations from the EM&V contractor's report.

Joint Utilities disagreed with TX ROSE and TLSC's assertion that changes to the TRM may need to be applied retrospectively. Rather, they agreed with staff that changes should only be applied prospectively and added that the TRM aides in the implementation of current programs and in the planning of future programs. They believed that TX ROSE and TLSC's suggested re-evaluation of the methodologies previously applied is not appropriate for the TRM. Further, they pointed out that the revised EEIP section of the rule (subsection (s)) affords TX ROSE and TLSC the opportunity to present comments and information to the commission and stakeholders regarding historical savings.

Commission response

The commission believes that the provisions in this subsection are consistent with the IPMVP and the baseline definitions are consistent with industry standard practice. Similarly, applying the changes in an updated TRM prospectively is consistent with industry and regulatory practice in other states. Furthermore, and most importantly, this policy provides certainty and thus encouragement for development and implementation of energy efficiency actions using best available, and with the TRM, approved, savings values, without the potentially chilling effect of retroactive changes due to information beyond the control of program participants or efficiency providers. With regard to TX ROSE and TLSC's concerns about commission staff approving the TRM, the commission points out that the items to be included in the TRM such as the deemed savings and the procedures for creating and updating the TRM as outlined in subsection (q)(6) have been reviewed and approved by the commission either in a proceeding pursuant to subsection (i)(4) or in this rulemaking proceeding. Therefore, the commission does not see the need for the commission to further approve a manual that is the compilation of items previously approved by the commission. As the level of detail in the EM&V sections is being reduced, the commission believes that some of the concerns expressed by TX ROSE and TLSC are no longer relevant.

In their reply comments, TX ROSE and TLSC stated that there are provisions in the rule that undermine the EM&V effort. They cited subsection (m)(1)(F), pertaining to the setting of a baseline, as an example of where the EM&V contractor may not have the flexibility to raise the baseline for certain programs. Therefore, they suggested that any language that would hinder the EM&V contractor's efforts should be deleted from the rule.

Commission response

In response to TX ROSE and TLSC's comments regarding baselines, the commission has deleted subsection (m)(1)(F) to avoid any potential conflict with the language in this subsection. General requirements for baselines, outlined under subsection (q)(8), provide an indication to the utilities, EM&V contractor, and other stakeholders as to the basis for which savings are to be determined. These requirements follow industry standard practice.

REP Coalition warned that while subsection (q)(13)(B) would require the EM&V contractor to aggregate the data that is included in its report or filing, it again suggested the EM&V contractor may be compelled to offer the underlying data in response to a discovery request. In response to these concerns, REP Coalition would prefer for the utilities to limit the documents and information provided to the EM&V contractor by aggregating the data to mask any proprietary information relating to a specific REP or customer. EnerNOC also urged the commission to require an EM&V contractor to protect any proprietary information of any energy service provider and suggested that this subsection be modified to include service providers. OPUC encouraged the commission to safeguard customer information and urged the commission to adopt the language proposed by the REP Coalition.

In contrast, Cities urged the commission to reject the request to only provide aggregated data to the EM&V contractor. They stated that REP Coalition has not adequately explained why the use of a standard protective order would be inadequate and that customer-specific data is often examined in rate cases.

Commission response

As stated above, the commission treats the protection of customer information seriously. However, the commission agrees with Cities that, in addition to the language added to subsection (q)(11), the commission's standard procedures for protecting confidential and sensitive information in the course of litigated proceedings will be sufficient in this context as well. In response to EnerNOC's suggestion, the commission has modified subsection (q)(11)(B) to include REPs and energy efficiency service providers.

REP Coalition opposed the exclusion of the EM&V costs from the overall program cost caps, as outlined in subsection (q)(12)(B). It believed that excluding these costs will allow the costs to implement subsection (q) to increase dramatically. Therefore, the commission should examine the cost-effectiveness of the EM&V process, because ultimately the retail customers will bear the costs of retaining an EM&V contractor.

Commission response

The commission appreciates the comments from REP Coalition regarding the exclusion of EM&V costs from the cost caps. The commission will work diligently to review competitive bids when selecting an EM&V contractor. Since the commission will be responsible for hiring and maintaining a contractor, the costs associated with the EM&V will be outside of the control of the utilities. Similar to the rationale applied in the discussion of the municipalities' rate case expenses, the commission believes it is appropriate to exclude these expenses from the list of expenses that must remain under the cost caps.

Opower offered an addition to the list of documents included in the TRM, as outlined in subsection (q)(6)(A). It believed that an additional reference to protocols should be made to acknowledge their importance to the TRM.

Commission response

In response to Opower's suggestion, the commission agrees to add "protocols" to the list of resources that can be used in developing a TRM. The commission also agrees that the TRM may include standardized EM&V protocols; however, whether such protocols would be applied in a mandatory or voluntary manner is left to the process through which the commission staff approves the initial TRM and adopts any further amendments to future TRMs.

In addition to the changes adopted in response to comments, the commission has also added language that clarifies that the EM&V expenses incurred and expected to be incurred in 2013 and 2014 shall be recovered in utilities' 2013 EECRFs. The commission expects the EM&V contractor to begin work in early 2013 and it is imperative that utilities have the resources available to pay the invoices submitted by the EM&V contractor for its evaluation of the programs and development of the TRM.

The addition of subsection (q), Evaluation, measurement, and verification (EM&V), necessitates several clarifications throughout this subsection. In the definition of claimed savings (in subsection (c)(3)), the commission makes a change to the first sentence to clarify that claimed savings are values reported by an electric utility after the energy efficiency activities have been completed, but prior to an independent, third party evaluation of the savings is performed. The commission also clarifies that evaluated savings (in subsection (c)(20)) are savings estimates that may also include adjustments to claimed savings. The commission adopts clarifying changes to subsection (p) to reflect the addition of the new EM&V process.

Subsection (r); Targeted low income energy efficiency program

First, TX ROSE and TLSC stated that the low-income program is the only program statutorily required and that the Legislature intended for low-income customers to have access to programs. They believed that the 10% set aside of a utility's budget is conservative, considering the percent of low-income customers across the state. They offered language that would ensure that the utilities spend at least 10% of their budget on low-income programs and stated that any funds allocated above and beyond 10% could be used for hard-to-reach programs if these funds are unused by July of the program year. They also argued that a utility should not be allowed to spend less than the statutorily-required amount. Second, they also provided language for a new subsection that would require the utilities to offer programs that complied with the federal weatherization requirements. Finally, they requested that language from PURA §39.905(f) be added that would require the TDHCA to provide reports to the commission regarding current energy and demand savings achieved by each utility.

Similarly, TACAA provided a recommendation that would establish appropriate benchmarks to be used by utilities to determine whether the amount of funding to a particular service provider should be reduced because of the inability to meet the benchmarks. Any funds re-allocated as a result of this failure should be specifically earmarked for programs serving low-income customers, including making these funds available to another service provider who has met the benchmarks. It proposed language that would allow a utility to reduce the contracted amount after six or nine months of implementation of the program in proportion to the difference between the original contracted amount and the total funds obligated.

Joint Utilities replied to TX ROSE and TLSC's comments by stating that utilities need the flexibility to move funds from under-performing programs to those with higher participation in order to meet their goals. They are in agreement with TACAA that subsection (r)(3) could be revised to change the phrase "unspent funds" to "funds that are not obligated."

Commission response

In response to TX ROSE and TLSC's first suggestion, the commission agrees with the response of Joint Utilities that if funds are unable to be spent on the targeted low-income programs, those funds should be reallocated to the hard-to-reach program, which also serves customers at or below 200% of the federal poverty guidelines. In SB 1434 (82nd Regular, 2011), the Legislature amended PURA §39.905(f) to update the measure of funding for low-income programs from the level of funding in hard-to-reach programs in 2003 to a percentage of the utility's energy efficiency budget. SB 1434 provides that within the utility's budget for the program year, 10% of the budgeted funds should be designated for targeted low-income programs. However, the bill left unchanged another provision of the statute which provides that "[t]he commission shall determine the appropriate level of funding to be allocated to both targeted and standard offer low-income energy efficiency programs in each unbundled transmission and distribution utility service area." Reading these two provisions together, the commission believes it to be within the language and the policy intent of the revised statute that at least 10% of the utility's energy efficiency budget should be designated for targeted low-income programs, but if the required amount of targeted low-income program funds are not obligated after July of a program year, such funds may be reallocated to hard-to-reach programs in order to ensure that those funds will still be spent for the purpose of providing low-income customers with access to energy efficiency.

The commission appreciates TACAA's recognition of the distinction between unspent and unobligated funds, considering that service providers submit proposals for providing services in advance of determining the number of customers that will actually participate in the low-income programs. The commission agrees with TACAA and Joint Utilities that the modification to subsection (r)(3) should be made and has amended the language accordingly.

With regard to TX ROSE and TLSC's second suggestion, this subsection was modified to recognize that the DOE currently requires agencies receiving assistance for the Weatherization Assistance Program (WAP) to use the SIR methodology to determine cost-effectiveness of individual measures and an overall program. As a result, agencies receiving funding from the DOE such as TDHCA also use the ratio when it conducts an energy audit of a customer's home to determine which measures meet the cost-effectiveness test and are eligible to be installed, up to a $6,500 maximum. The commission recognized this policy and approved the use of the SIR by utilities in areas open to competition in Docket Number 32103, *Commission Staff's Application for Approval of Plan to Implement Targeted Low-Income Energy Efficiency Programs.* Therefore, the current language conforms to the statutory requirements outlined in PURA §39.905(f), and TX ROSE and TLSC's proposed modifications are unnecessary.

SPS recommended that the rule allow utilities in areas not open to competition to also use the SIR to measure the cost-effectiveness of their low-income programs rather than the cost-effectiveness standard required in subsection (d). Through its low-income program, SPS offers funding to non-profit community action agencies and governmental agencies that provide weatherization services to residential customers that meet the DOE income eligibility guidelines. Since 1995, it has offered a low-income program that is patterned after the DOE's WAP, which is the model for programs administered under PURA §39.905(f). It added that it would be extremely difficult for a utility to demonstrate that its low-income program is cost-effective under subsection (d), which could potentially call into question the continuation of this vital program. It also felt it was important to note that the low-income programs offer additional installation and repair costs that: (1) do not offer any additional savings; and

(2) would not be provided under any other program. All of this works to decrease the cost-effectiveness of the overall program and would reduce the number of measures installed if the utility had to demonstrate compliance with subsection (d). Therefore, it asked that it be allowed to continue to utilize the SIR method, as provided for utilities in areas open to competition and offered language that would permit utilities in areas not open to competition to use the same methodology used by the other utilities.

TX ROSE and TLSC supported SPS' requested language, stating that using the same methodology to calculate energy and demand savings for all low-income programs will provide for more efficient and effective review of these programs. Further, they recognized that the SIR method is used to determine the cost-effectiveness of measures installed under the federal weatherization programs and complies with PURA §39.905(f). While not specifically stated in written comments, they take exception to parties' suggestions that the low-income programs are the most expensive programs. They argued that the costs of these programs have not been subject to review by an EM&V contractor, which means that the net-to-gross ratio has not been applied nor were the savings adjusted for free ridership, which they argued is not applicable to these programs because the measures would not be installed absent incentives from the utilities.

Joint Utilities offered an additional change to SPS's proposed modifications to clarify that the overall program should be evaluated using the SIR methodology. The use of the SIR has been questioned in recent EECRFs and Joint Utilities wanted to clarify that this method is used not only to determine which measures should be installed in an individual household but also to determine the overall cost-effectiveness of a low-income program under the DOE guidelines established for the WAP. They believed that staff was interpreting the audit requirement in PURA §39.905(f) to include the application of the SIR to low-income programs, and it should be applied at the program and measure level to be in compliance with the DOE requirements. This change would highlight the distinction between the cost-effectiveness of low-income programs and all other programs that must comply with the cost-effectiveness standard outlined in subsection (d). They argued that the low-income programs may have a positive SIR but would not meet the cost-effectiveness standard that is based on avoided costs.

Commission response

The commission recognizes the importance of uniformity in administering low-income programs across the state. While the statute does not require utilities in areas not open to competition to provide low-income programs, those that choose to administer these programs should afford their customers the same benefits as those in areas open to competition. This includes allowing program administrators in areas not open to competition to use the SIR methodology when serving low-income customers. The commission believes that if a utility in an area not open to competition is subject to the SIR methodology, rather than the cost-effectiveness standard set forth in subsection (d), this ensures that customers in these service territories qualify for the same types of measures installed in areas open to competition up to the $6500 household maximum. The commission appreciates SPS's comments and TX ROSE and TLSC's support of those comments and has included its proposed language in this subsection. The commission also adopts Joint Utilities' proposed modification to subsection (r)(2) to clarify that the SIR applies to the cost-effectiveness of measures eligible to be installed and the overall program.

As to TX ROSE and TLSC's recommendation regarding the request of reports from TDHCA, the commission currently receives plans and reports from utilities every April that outlines the measured and verified savings for the previous five years and the planned savings for the current and following year. Therefore, the commission declines to adopt TX ROSE and TLSC's suggested language.

Subsection (s); Energy Efficiency Implementation Project - EEIP

TX ROSE and TLSC commented that the EEIP should not be allowed to approve programs or program changes. The utility should be required to submit information on a new program or program amendment in an EECRF proceeding. They also disagreed with the provision that would allow utilities to update program changes in its EEPR without coming to the EEIP. They stated that reviewing the EEPRs is a time consuming task and many parties lack the resources to review them. They suggested that the utilities be required to notify the EEIP when a new program is developed or a change is made to an existing program.

Joint Utilities stated that the phrase "substantially different" added to subsection (s)(3) should be defined. They believed that deciding whether or not a program is substantially different requires the use of considerable judgment.

In replies, Joint Utilities opposed TX ROSE and TLSC's proposal to litigate program design issues during the EECRF proceedings. They stated that the utilities implement programs that have been approved by the commission. They agreed with the proposed rule, which sets forth a process where program design issues are discussed at EEIP meetings. Additionally, comments could be filed or raised at an EEIP meeting in response to annual EEPR filings. Participation in the EEIP would be much more efficient than the proposals advanced by TX ROSE and TLSC, which takes place after the utilities have already initiated programs and incurred expenses. Joint Utilities also opposed TX ROSE and TLSC's proposal to require the utilities to file a new program template each time a program differs "in any way" from an existing program. They stated that there will always be slight variations in the implementation of the same program by each utility, and requiring multiple filings places an unnecessary burden on the commission.

Opower suggested clarification on the role of the EEIP with regards to the introduction of new programs or program redesigns, as outlined in subsection (s)(5). It recommended a process where the EEIP is notified about the new program and is offered 21 days to provide comments. The utility could then petition the commission and the commission would have the flexibility to act on the petition or allow the program to go into effect after 45 days.

Commission response

In response to Joint Utilities' comment regarding the term substantially different, the commission believes that it is necessary to leave subsection (s)(3) general, because attempting to specifically define what constitutes a substantially different program would be difficult and could produce unintended results. As provided for under subsection (s)(6), if a party files a petition with the commission to consider changes to programs, the utility may be asked to provide a program template and additional information regarding the changes to the program in this proceeding.

As previously stated in response to comments in subsection (f), the commission is modifying the role of the EEIP to allow stakeholders to provide feedback on programs or potential programs

at the beginning of the process. This allows stakeholders and commission staff to provide input that could be used to modify existing or planned programs. If the utility is offering a new program or making programmatic changes that coincide with the filing of its EEPR, those would be outlined in the report and could be discussed at an EEIP prior to the utility's EECRF filing. Further, the rule also requires utilities to use standard forms, procedures, deemed savings estimates, and program templates, as outlined in subsection (i)(4). A utility offering a new program during a program year would be required to make a filing with the commission using the program template approved in Docket Number 31965, *Application of PUC Legal for Approval of Energy Efficiency Program Template*. Part of this requirement also includes distribution of the filing to the EEIP listserv. Stakeholders are encouraged to file comments supporting or making recommendations for modifications to the proposed program. The current process allows utilities to begin offering new programs in an efficient manner, usually within 30 days of filing the template with the commission and providing notice to the EEIP. This process is consistent with Opower's suggested changes to subsection (s)(5); the commission believes that no additional changes are warranted.

The rule as adopted provides that cost recovery is addressed in the EECRF proceedings. Subsection (f)(12) specifically states that "the proceeding shall not include a review of program design to the extent the programs complied with the energy efficiency implementation project (EEIP) process defined in subsection (s) of this section." The commission appreciates the comments of Joint Utilities and would like to move forward with this delineation between the role of the EEIP and the scope of the EECRF proceedings. Therefore, the commission declines to make additional changes to this subsection.

Subsection (t); Retail providers

No comments.

Subsection (u); Customer protection

No comments.

Subsection (v); Grandfathered programs

No comments.

Subsection (w); Identification notice

Two parties filed comments in support of an opt-out provision for an industrial customer taking electric service at distribution voltage. TIEC, who originally proposed the new provision, bolstered their position by citing PURA §39.905(a)(3), which they argued states that only residential and commercial customers are eligible to participate in energy efficiency programs. PURA §39.905(b)(4) goes on to state that the costs associated with the programs shall be borne by the customer classes that receive services. They asserted that the Legislature acknowledged that industrial customers are large consumers that are incented to reduce their energy usage through adopting energy efficiency measures absent any incentives from utilities. Furthermore, industrial customers are able to participate in market-based demand response programs such as those offered by ERCOT and do not rely on receiving an incentive through a utility's load management program. They noted that residential and commercial customers do not pay for demand response or energy efficiency measures self-implemented by industrial customers. Likewise, industrial customers should not be required to pay for programs provided to other customer classes. In Project Number 33487, the commission excluded transmission-level industrial customers from the definition of eligible customers, except to the extent they were participating in utility load management programs that were implemented prior to May 1, 2007. TIEC argued that the exclusion of only transmission-level customers did not go far enough because distribution-level industrial customers continue to pay for energy efficiency costs. Their proposed solution, developed in conjunction with CenterPoint, is the addition of subsection (w), which allows distribution-level industrial customers to identify themselves by submitting an identification notice, including a copy of the customer's Texas Sales and Use Tax Exemption Certification. This provision would allow those customers that provide the requisite information to "opt-out" of the energy efficiency programs, and TIEC believed this is a reasonable compromise that carries out the legislative intent to exclude industrial customers.

Walmart also supported the opt out provision for an industrial customer taking electric service at distribution voltage and requested that the opt-out provision be expanded to include commercial customers who make investments in energy efficiency and demand-side management without the use of utility incentives. It provided rule language that would allow any customer with consumption of one million kWh that implements its own energy efficiency programs to opt-out. It added that these customers are already looking for ways to stay competitive and have the ability to tailor programs to meet their specific needs. It argued that there is no difference between the rationale applied to the industrial opt-out and an expanded opt-out for commercial customers. It further stated that since some of the industrial customers that would be included under this provision are in the same rate classes as the large commercial customers, it would not be more difficult to track these additional customers that would be excluded from the programs. It further noted that commercial customers who reduce their consumption apart from utility incentives provide a direct benefit to the grid, as they reduce the total demand on the system. If commercial customers were allowed to opt-out, Walmart added that such customers would have more funds available to invest in their own programs while they themselves assume all the risks of their investments.

Joint Utilities supported the comments of Public Citizen and the SEED Coalition, Sierra Club, EDF, CLEAResult, OPUC, EnerNOC, and Cities and replied that Walmart's proposal illustrates how an opt-out provision for manufacturing facilities served at distribution voltage could lead to a slippery slope, whereby customers continually propose to establish their own programs. This could lead to smaller energy efficiency programs, increased administrative complexity in determining eligibility, and increased administrative costs.

Walmart defended its position by responding to the concerns expressed by EDF, Joint Utilities, and Sierra Club. Specifically, it countered comments that suggested that the opt-out provision would decrease the funds available for energy efficiency programs and that the customers that might opt-out have historically participated in the programs. It believed that its proposed commercial opt-out already addresses these concerns. Walmart reiterated that its proposal is limited to customers with consumption of one million kWh or greater who can demonstrate that they have installed or plan to install energy efficiency measures to reduce their overall consumption by the amounts specified in PURA §39.905. Those customers that have participated in one of a utility's programs would not be eligible to opt-out for a period of five years. In response to concerns voiced by the Joint Utilities about the ability to meet their goals absent distribution-level industrial customers, it proposed a modification to the commercial

opt-out through the use of self-directed rebates for customized programs that meet the specific needs of the commercial customers.

CLEAResult, EnerNOC, Joint Utilities (with the exception of CenterPoint who supported the opt-out language), Public Citizen, SEED Coalition, and Sierra Club opposed the proposed new subsection. Joint Utilities stated that other than the comments filed by TIEC in Project Number 33487 in 2007, there is no legislative or regulatory history to suggest that industrial customers taking service at distribution voltage should be excluded from the rule. To support their position, they cited PURA §39.904(m-1), relating to the Goal for Renewable Energy, as an example of specific exclusions provided by the Legislature for industrial customers choosing not to participate in the REC program. PURA §39.904(m-1) states, in relevant part that "the commission shall reduce the requirement under Subsection (c)(1) for a retail electric provider, municipally owned utility, or electric cooperative that is subject to a renewable energy requirement under this section that serves *a customer receiving electric service at transmission-level voltage* if, before any year for which the commission calculates renewable energy requirements under Subsection (c)(1), the customer notifies the commission in writing that the customer chooses not to support the goal for renewable energy under this section for that year" (emphasis added). The commission established Project Number 35113, *Industrial Customers Notification Under PURA Section 39.904(m-1) Relating to Non-Support of Renewable Energy Requirements,* which provides transmission-level industrial customers the ability to opt-out of the REC requirement so long as this request is renewed every two years. They concluded that if the Legislature had intended to exclude a group of customers from the energy efficiency programs, it could have done so in PURA §39.905.

TIEC countered Joint Utilities comments regarding PURA §39.904(m-1) by arguing that this section creates a voltage-level distinction among the industrial class, whereas PURA §39.905 excluded all industrial customers, regardless of voltage level. They further stated that if the Legislature had intended to exclude only transmission-level customers from the energy efficiency requirements, it would have included language to that effect in PURA §39.905.

Joint Utilities strongly opposed the imposition of any opt-out provisions for manufacturing facilities taking service at distribution voltage due to the following reasons: (1) excluding certain customers from the energy efficiency programs is at odds with the commission's objective to maximize demand and energy savings across the state; (2) if energy efficiency programs benefit all customers then it is unfair to allow certain customers to receive the benefits without also incurring a portion of the costs; (3) the commission previously rejected TIEC's request to define industrial customers based on Tax Code exemptions in Project Number 33487, but instead relied on voltage level and exempted transmission-level customers and nothing has changed since 2008 that would challenge the commission's original position; (4) nothing in PURA specifically allows distribution-level customers to opt-out and this proposal is at odds with PURA §39.905(a)(2), which states that "all customers, in all customer classes, will have a choice of and access to energy efficiency alternatives;" (5) some of the customers that would be allowed to opt-out have previously participated in utility programs and would be allowed to enjoy the benefits of the installed measures without continuing to contribute to the costs of the programs; (6) the billing systems developed by utilities cannot readily identify customers with a manufacturing tax exemption, which would increase the costs of all utilities by an estimated $500,000 to implement necessary system changes; (7) the number of customers that could potentially opt-out is unknown; (8) it would reduce the ability of utilities to achieve required goals; (9) exemptions of certain customers would require the recalculation of the "floor" for a goal set each year, meaning that the provision that prevents a utility from achieving a lower goal than the previous year would need to be revisited; (10) absent an adjustment of the floors, significant costs could be shifted to the remaining customers; and (11) it is unclear how the industrial accounts that do not have a manufacturing or industrial component should be handled.

TIEC argued, in response to Joint Utilities' comment that the number of accounts affected is unknown, that all industrial customers are entitled to the exemption and the number of accounts does not have an impact on this exemption. They believed the provision as proposed would result in fewer distribution-level industrial customers being excluded from the programs since the burden is on the customers to provide the requisite information to the utilities. They also disagreed with Joint Utilities' statement that this provision would result in administrative difficulties such as the above mentioned changes to the utilities' billing systems. They believed that the language takes administrative complexity into account and is designed to be easy for the utilities to administer. They noted that Oncor and CenterPoint have already segregated the transmission-level rate classes, so segregation at the distribution level should also be feasible.

Similar to the comments advanced by Joint Utilities, EnerNOC argued that there is nothing in SB 1125, enacted laws, or commission rules that would allow an industrial customer taking service at distribution voltage to exclude itself from the utility's programs. PURA §39.905 already exempts industrial customers from the programs, with the exception of those that continue to participate in a utility's load management programs. EnerNOC cited an article that demonstrates that not all industrial customers have achieved their energy efficiency potential. *See Money Well Spent: Industrial Energy Efficiency Program Spending in 2010,* American Council for an Energy Efficient Economy (April 5, 2012). It also stated that there is no reason the commission should limit access to customers who could potentially provide significant additional efficiency opportunities to the grid and benefit from the utilities' programs. It further commented that this provision adds uncertainty to the programs, including a utility's determination of its demand goal. It believed the utilities would be required to verify that each commercial customer is eligible to participate because of the potentially broad impact of subsection (w) resulting from the broad definition of industrial customer in subsection (c)(30). It concluded by stating that all customers benefit from the energy efficiency by reducing usage and demand on the grid and that removing certain customers from the program is detrimental to all customers who expect reliable service.

In response, TIEC stated that the provision allows industrial customers, which EnerNOC acknowledged are exempt under PURA §39.905, taking service at distribution voltage to opt-out. This would not extend to commercial facilities owned by customers that also have industrial facilities. They went on to note that many industrial customers are served at distribution voltage, and the voltage level does not factor into whether a customer is a commercial or industrial customer. They stated that customers engaging in industrial processes should be exempt from the energy efficiency requirements. They added that the manufacturing tax exemption included in the proposed rule does not apply to accounts that are not engaged in an industrial process, so

commercial accounts would not be eligible. Further, the office buildings of a company whose primary business is an industrial process would not qualify for the exemption. They also added that the verification issues raised by EnerNOC will be addressed by the development of a standardized form.

In response to EnerNOC's summary of the *Money Well Spent* report, TIEC stated that the report only looked at public monies spent and did not examine additional expenditures by industrial customers in the private sector. TIEC also cited the report prepared for ERCOT by the Brattle Report to contend that requiring distribution-level industrial customers to continue to participate in the utilities' programs is counter to encouraging demand response programs in the ERCOT market. TIEC believed that providing these customers an opt-out would allow them to use their resources to develop self-funded energy efficiency programs and to efficiently participate in the market.

Public Citizen, SEED Coalition, and Sierra Club offered comments similar to others opposing the opt-out provision by stating that the commission does not have the statutory authority to exclude certain commercial facilities from the programs. They are also concerned that this exclusion would reduce the amount of funding available for utilities' programs, which would in turn reduce their ability to meet their goals. Therefore, they believed, as did CLEAResult, that this subsection should be deleted from the rule. In replies, CLEAResult reiterated its opposition to the new subsection and added that this provision will place a greater financial burden on customers still participating in the programs.

TREIA supported the comments filed by Cities, CLEAResult, EDF, EnerNOC, Joint Utilities, OPUC, Public Citizen, SEED Coalition, and Sierra Club. It stated that all customers benefit from energy efficiency regardless of participation and allowing certain customers to opt-out reduces funding for the programs and undermines public support for the programs by shifting costs to the remaining customers.

Commission response

As discussed above in response to comments regarding proposed subsection (c)(11) and (30), the larger policy of excluding industrial customers has been established by the Legislature, and the commission is now required to implement that policy. As previously noted, in HB 3693 of the 80th Legislature, Regular Session in 2007, the Legislature added language to PURA §39.905(a) and (b) to clarify that the energy efficiency goals and programs under the statute were to be oriented to residential and commercial customers, and that it is these customers receiving services under the programs that are to bear the cost of the programs. PURA §39.905(a)(3) now specifically limits a utility's energy efficiency programs to residential and commercial customers. The commission acknowledges, as pointed out by the Joint Utilities, that the commission previously rejected TIEC's request to define industrial customers based on tax code exemptions but instead opted to rely on voltage level as a more practical and simpler method to identify an industrial customer. However, the commission believes that the particular approach proposed in the current rulemaking by TIEC and CenterPoint is more effective than what was proposed by TIEC in Project Number 33487 and will allow industrial customers engaged in an industrial process taking service at distribution voltage to opt-out in a manner that minimizes burdens on utilities and remaining commercial customers, and yet complies with the language and policy of the statute.

In reply to the Joint Utilities' fear that the proposed opt-out provision would reduce the ability of a utility to achieve their required goals, the commission notes that subsection (w) provides that a utility's demand reduction goal shall be adjusted to remove any load lost as a result of a customer exercising its right to opt-out. In response to similar concerns regarding the provision that prevents a utility from achieving a lower goal than the previous year, the commission notes that subsection (e)(1)(E) provides an exception for a utility in accordance with subsection (w). Furthermore, since a customer must submit a notice by the date specified in subsection (w) in order to be eligible to opt-out in the next program year, the commission believes the utility will have sufficient time to adjust its goals and programs costs to reflect the customer base its programs will serve.

The commission disagrees with Walmart that large commercial customers should also be permitted to opt-out. The Legislature has not written such an exclusion into the law and Walmart's proposal may be difficult to administer and may have adverse effects on customers who are not able to opt-out.

Therefore, for the reasons stated above, the commission declines to adopt changes to subsection (w).

Subsection (x); Administrative penalty

Sierra Club suggested that the commission restore subsection (x)(4) and (5) from the current rule, because they believed the provisions are important in determining whether to assess an administrative penalty on a utility for failure to meet its energy efficiency goal.

Commission response

The commission deleted these two provisions, which relate to the utility's actions to correct any deficiencies and the utility's effectiveness in administering its programs, in the proposed rule because PURA §15.023, relating to Administrative Penalty, Disgorgement Order, or Mitigation, contains similar provisions that shall be considered in the case of a potential violation. For example, PURA §15.023(c)(5) requires the commission to consider efforts to correct the violation when assessing an administrative penalty. As a result, the commission has deleted the language in the rule, because it is unnecessary given the Legislative directive on administrative penalties codified in PURA.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes changes for the purpose of clarifying its intent, including changes throughout this section to conform to the new subsection (q) provisions.

The amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §§14.001, 14.002, 36.204, and 39.905 (West 2007 and Supplement 2011) (PURA). Section 14.001 provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; §14.002 provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §36.204 authorizes the commission to establish rates for an electric utility that allow timely recovery of the reasonable costs for conservation and load management, which includes additional incentives for conservation and load management; §39.905 requires the commission to provide oversight of energy efficiency programs of electric utilities subject to that section and adopt

rules and procedures to ensure that electric utilities subject to that section can achieve their energy efficiency goals, including rules providing for EECRFs and an incentive for electric utilities that meet the energy efficiency goals; SB 1125, which amends PURA §39.905(a), (b), and (d) and adds subsections (h) and (k), and which increases the energy efficiency goals, defines demand-side renewable systems, expands the list of eligible programs to include behavioral measures, requires the development of an evaluation, measurement, and verification (EM&V) framework, allows non-ERCOT utilities to develop self-directed programs and ERCOT utilities to offer these programs after a contested case proceeding and adds PURA §39.9054, which requires the utilities to submit an annual plan and report; SB 1434, which amends PURA §39.905(f), which requires at least 10% of a utility's budget to be set aside for low-income programs; SB 1150, which amends PURA §39.402(a), which requires Southwestern Public Service Company to establish an EECRF; and SB 1910, which adds PURA §39.555, which allows El Paso Electric Company to market an energy efficiency program directly to a retail electric customer.

Cross Reference to Statutes: PURA §§14.001, 14.002, 36.204, 39.905, SB 1125 (codified as PURA §39.905(a), (b), (d), (h), and (k)), SB 1434 (codified as PURA §39.905(f)), SB 1150 (codified as PURA §39.402(a)), and SB 1910 (codified as PURA §39.555).

§25.181. Energy Efficiency Goal.

(a) Purpose. The purpose of this section is to ensure that:

(1) electric utilities administer energy efficiency incentive programs in a market-neutral, nondiscriminatory manner and do not offer competitive services, except as permitted in §25.343 of this title (relating to Competitive Energy Services) or this section;

(2) all customers, in all eligible customer classes and all areas of an electric utility's service area, have a choice of and access to the utility's portfolio of energy efficiency programs that allow each customer to reduce energy consumption, summer and winter peak demand, or energy costs; and

(3) each electric utility annually provides, through market-based standard offer programs, targeted market-transformation programs, or utility self-delivered programs, incentives sufficient for residential and commercial customers, retail electric providers, and energy efficiency service providers to acquire additional cost-effective energy efficiency, subject to EECRF caps established in subsection (f)(7) of this section, for the utility to achieve the goals in subsection (e) of this section.

(b) Application. This section applies to electric utilities.

(c) Definitions. The following terms, when used in this section, shall have the following meanings unless the context indicates otherwise:

(1) Affiliate--

(A) A person who directly or indirectly owns or holds at least 5.0% of the voting securities of an energy efficiency service provider;

(B) A person in a chain of successive ownership of at least 5.0% of the voting securities of an energy efficiency service provider;

(C) A corporation that has at least 5.0% of its voting securities owned or controlled, directly or indirectly, by an energy efficiency service provider;

(D) A corporation that has at least 5.0% of its voting securities owned or controlled, directly or indirectly, by:

(i) a person who directly or indirectly owns or controls at least 5.0% of the voting securities of an energy efficiency service provider; or

(ii) a person in a chain of successive ownership of at least 5.0% of the voting securities of an energy efficiency service provider; or

(E) A person who is an officer or director of an energy efficiency service provider or of a corporation in a chain of successive ownership of at least 5.0% of the voting securities of an energy efficiency service provider;

(F) A person who actually exercises substantial influence or control over the policies and actions of an energy efficiency service provider;

(G) A person over which the energy efficiency service provider exercises the control described in subparagraph (F) of this paragraph;

(H) A person who exercises common control over an energy efficiency service provider, where "exercising common control over an energy efficiency service provider" means having the power, either directly or indirectly, to direct or cause the direction of the management or policies of an energy efficiency service provider, without regard to whether that power is established through ownership or voting of securities or any other direct or indirect means; or

(I) A person who, together with one or more persons with whom the person is related by ownership, marriage or blood relationship, or by action in concert, actually exercises substantial influence over the policies and actions of an energy efficiency service provider even though neither person may qualify as an affiliate individually.

(2) Baseline--A relevant condition that would have existed in the absence of the energy efficiency project or program being implemented, including energy consumption that would have occurred. Baselines are used to calculate program-related demand and energy savings. Baselines can be defined as either project-specific baselines or performance standard baselines *(e.g.,* building codes).

(3) Claimed savings--Values reported by an electric utility after the energy efficiency activities have been completed, but prior to the time an independent, third-party evaluation of the savings is performed. As with projected savings estimates, these values may utilize results of prior evaluations and/or values in technical reference manuals. However, they are adjusted from projected savings estimates by correcting for any known data errors and actual installation rates and may also be adjusted with revised values for factors such as per-unit savings values, operating hours, and savings persistence rates. Can be indicated as first year, annual demand or energy savings, and/or lifetime energy or demand savings values. Can be indicated as gross savings and/or net savings values.

(4) Commercial customer--A non-residential customer taking service at a metered point of delivery at a distribution voltage under an electric utility's tariff during the prior program year or a non-profit customer or government entity, including an educational institution. For purposes of this section, each metered point of delivery shall be considered a separate customer.

(5) Competitive energy efficiency services--Energy efficiency services that are defined as competitive under §25.341 of this title (relating to Definitions).

(6) Conservation load factor--The ratio of the annual energy savings goal, in kilowatt hours (kWh), to the peak demand goal for the year, measured in kilowatts (kW) and multiplied by the number of hours in the year.

(7) Deemed savings calculation--An industry-wide engineering algorithm used to calculate energy and/or demand savings of the installed energy efficiency measure that has been developed from common practice that is widely considered acceptable for the measure and purpose, and is applicable to the situation being evaluated. May include stipulated assumptions for one or more parameters in the algorithm, but typically requires some data associated with actual installed measure. An electric utility may use the calculation with documented measure-specific assumptions, instead of energy and peak demand savings determined through measurement and verification activities or the use of deemed savings.

(8) Deemed savings value--An estimate of energy or demand savings for a single unit of an installed energy efficiency measure that has been developed from data sources and analytical methods that are widely considered acceptable for the measure and purpose, and is applicable to the situation being evaluated. An electric utility may use deemed savings values instead of energy and peak demand savings determined through measurement and verification activities.

(9) Demand--The rate at which electric energy is used at a given instant, or averaged over a designated period, usually expressed in kW or megawatts (MW).

(10) Demand savings--A quantifiable reduction in demand.

(11) Eligible customers--Residential and commercial customers. In addition, to the extent that they meet the criteria for participation in load management standard offer programs developed for industrial customers and implemented prior to May 1, 2007, industrial customers are eligible customers solely for the purpose of participating in such programs.

(12) Energy efficiency--Improvements in the use of electricity that are achieved through customer facility or customer equipment improvements, devices, processes, or behavioral or operational changes that produce reductions in demand or energy consumption with the same or higher level of end-use service and that do not materially degrade existing levels of comfort, convenience, and productivity.

(13) Energy Efficiency Cost Recovery Factor (EECRF)--An electric tariff provision, compliant with subsection (f) of this section, ensuring timely and reasonable cost recovery for utility expenditures made to satisfy the goal of PURA §39.905 that provide for a cost-effective portfolio of energy efficiency programs pursuant to this section.

(14) Energy efficiency measures--Equipment, materials, and practices, including practices that result in behavioral or operational changes, implemented at a customer's site on the customer's side of the meter that result in a reduction at the customer level and/or on the utility's system in electric energy consumption, measured in kWh, or peak demand, measured in kW, or both. These measures may include thermal energy storage and removal of an inefficient appliance so long as the customer need satisfied by the appliance is still met.

(15) Energy efficiency program--The aggregate of the energy efficiency activities carried out by an electric utility under this section or a set of energy efficiency projects carried out by an electric utility under the same name and operating rules.

(16) Energy efficiency project--An energy efficiency measure or combination of measures undertaken in accordance with a standard offer, market transformation program, or self-delivered program.

(17) Energy efficiency service provider--A person or other entity that installs energy efficiency measures or performs other energy efficiency services under this section. An energy efficiency service provider may be a retail electric provider or commercial customer, provided that the commercial customer has a peak load equal to or greater than 50 kW. An energy efficiency service provider may also be a governmental entity or a non-profit organization, but may not be an electric utility.

(18) Energy savings--A quantifiable reduction in a customer's consumption of energy that is attributable to energy efficiency measures, usually expressed in kWh or MWh.

(19) Estimated useful life (EUL)--The number of years until 50% of installed measures are still operable and providing savings, and is used interchangeably with the term "measure life". The EUL determines the period of time over which the benefits of the energy efficiency measure are expected to accrue.

(20) Evaluated savings--Savings estimates reported by the EM&V contractor after the energy efficiency activities and an impact evaluation have been completed. Differs from claimed savings in that the EM&V contractor has conducted some of the evaluation and/or verification activities. These values may rely on claimed savings for factors such as installation rates and the Technical Reference Manual for values such as per unit savings values and operating hours. These savings estimates may also include adjustments to claimed savings for data errors, per unit savings values, operating hours, installation rates, savings persistence rates, or other considerations. Can be indicated as first year, annual demand or energy savings, and/or lifetime energy or demand savings values. Can be indicated as gross savings and/or net savings values.

(21) Evaluation--The conduct of any of a wide range of assessment studies and other activities aimed at determining the effects of a program; or aimed at understanding or documenting program performance, program or program-related markets and market operations, program-induced changes in energy efficiency markets, levels of demand or energy savings, or program cost-effectiveness. Market assessment, monitoring, and evaluation, and measurement and verification (M&V) are aspects of evaluation.

(22) Evaluation, measurement, and verification (EM&V) contractor--One or more independent, third-party contractors selected and retained by the commission to plan, conduct, and report on energy efficiency evaluation activities, including verification.

(23) Free driver--Customers who do not directly participate in an energy efficiency program, but who undertake energy efficiency actions in response to program activity.

(24) Free rider--A program participant who would have implemented the program measure or practice in the absence of the program. Free riders can be total, in which the participant's activity would have completely replicated the program measure; partial, in which the participant's activity would have partially replicated the program measure; or deferred, in which the participant's activity would have completely replicated the program measure, but at a time after the time the program measure was implemented.

(25) Growth in demand--The annual increase in demand in the Texas portion of an electric utility's service area at time of peak demand, as measured in accordance with this section.

(26) Gross savings--The change in energy consumption and/or demand that results directly from program-related actions taken by participants in an efficiency program, regardless of why they participated.

(27) Hard-to-reach customers--Residential customers with an annual household income at or below 200% of the federal poverty guidelines.

(28) Impact evaluation--An evaluation of the program-specific, directly induced changes *(e.g.,* energy and/or demand reduction) attributable to an energy efficiency program.

(29) Incentive payment--Payment made by a utility to an energy efficiency service provider, an end-use customer, or third-party contractor to implement and/or attract customers to energy efficiency programs, including standard offer, market transformation and self-delivered programs.

(30) Industrial customer--A for-profit entity engaged in an industrial process taking electric service at transmission voltage, or a for-profit entity engaged in an industrial process taking electric service at distribution voltage that qualifies for a tax exemption under Tax Code §151.317 and has submitted an identification notice pursuant to subsection (w) of this section.

(31) Inspection--Examination of a project to verify that an energy efficiency measure has been installed, is capable of performing its intended function, and is producing an energy savings or demand reduction equivalent to the energy savings or demand reduction reported towards meeting the energy efficiency goals of this section.

(32) Installation rate--The percentage of measures that receive incentives under an energy efficiency program that are actually installed in a defined period of time. The installation rate is calculated by dividing the number of measures installed by the number of measures that receive incentives under an efficiency program in a defined period of time.

(33) International performance measurement and verification protocol (IPMVP)--A guidance document issued by the Efficiency Valuation Organization with a framework and definitions describing the M&V approaches.

(34) Lifetime energy (demand) savings--The energy (demand) savings over the lifetime of an installed measure(s), project(s), or program(s). May include consideration of measure estimated useful life, technical degradation, and other factors. Can be gross or net savings.

(35) Load control--Activities that place the operation of electricity-consuming equipment under the control or dispatch of an energy efficiency service provider, an independent system operator, or other transmission organization or that are controlled by the customer, with the objective of producing energy or demand savings.

(36) Load management--Load control activities that result in a reduction in peak demand, or a shifting of energy usage from a peak to an off-peak period or from high-price periods to lower price periods.

(37) Market transformation program--Strategic programs intended to induce lasting structural or behavioral changes in the market that result in increased adoption of energy efficient technologies, services, and practices, as described in this section.

(38) Measurement and verification--A subset of program impact evaluation that is associated with the documentation of energy or demand savings at individual sites or projects using one or more methods that can involve measurements, engineering calculations, statistical analyses, and/or computer simulation modeling. M&V approaches are defined in the IPMVP.

(39) Net savings--The total change in load that is attributable to an energy efficiency program. This change in energy and/or demand use shall include, implicitly or explicitly, consideration of appropriate factors. These factors may include free ridership, participant and non-participant spillover, induced market effects, changes in the level of energy service, and/or other non-program causes of changes in energy use and/or demand.

(40) Net-to-gross--A factor representing net program savings divided by gross program savings that is applied to gross program impacts to convert them into net program impacts. The factor may be made up of a variety of factors that create differences between gross and net savings, commonly considering the effects of free riders and spillover.

(41) Non-participant spillover--Energy savings that occur when a program non-participant installs energy efficiency measures or applies energy savings practices as a result of a program's influence.

(42) Off-peak period--Period during which the demand on an electric utility system is not at or near its maximum. For the purpose of this section, the off-peak period includes all hours that are not in the peak period.

(43) Participant spillover--The additional energy savings that occur when a program participant independently installs incremental energy efficiency measures or applies energy savings practices after having participated in the efficiency program as a result of the program's influence.

(44) Peak demand--Electrical demand at the times of highest annual demand on the utility's system. Peak demand refers to Texas retail peak demand and, therefore, does not include demand of retail customers in other states or wholesale customers.

(45) Peak demand reduction--Reduction in demand on the utility's system at the times of the utility's summer peak period or winter peak period.

(46) Peak period--For the purpose of this section, the peak period consists of the hours from one p.m. to seven p.m., during the months of June, July, August, and September, and the hours of 6 to 10 a.m. and 6 to 10 p.m., during the months of December, January, and February, excluding weekends and Federal holidays.

(47) Program year--A year in which an energy efficiency incentive program is implemented, beginning January 1 and ending December 31.

(48) Projected savings--Values reported by an electric utility prior to the time the energy efficiency activities are implemented. Are typically estimates of savings prepared for program and/or portfolio design or planning purposes. These values are based on pre-program or portfolio estimates of factors such as per-unit savings values, operating hours, installation rates, and savings persistence rates. These values may utilize results of prior evaluations and/or values in the Technical Reference Manual. Can be indicated as first year, annual demand or energy savings, and/or lifetime energy or demand savings values. Can be indicated as gross savings and/or net savings values.

(49) Rate class--For the purpose of calculating EECRF rates, a utility's rate classes are those retail rate classes approved in the utility's most recent base-rate proceeding, excluding non-eligible customers.

(50) Renewable demand side management (DSM) technologies--Equipment that uses a renewable energy resource (renewable resource), as defined in §25.173(c) of this title (relating to Goal for Renewable Energy), a geothermal heat pump, a solar water heater, or another natural mechanism of the environment, that when installed at a customer site, reduces the customer's net purchases of energy, demand, or both.

(51) Savings-to-Investment Ratio (SIR)--The ratio of the present value of a customer's estimated lifetime electricity cost savings from energy efficiency measures to the present value of the installation costs, inclusive of any incidental repairs, of those energy efficiency measures.

(52) Self-delivered program--A program developed by a utility in an area in which customer choice is not offered that provides incentives directly to customers. The utility may use internal or external resources to design and administer the program.

(53) Spillover--Reductions in energy consumption and/or demand caused by the presence of an energy efficiency program, beyond the program-related gross savings of the participants and without financial or technical assistance from the program. There can be participant and/or non-participant spillover.

(54) Spillover rate--Estimate of energy savings attributable to spillover expressed as a percent of savings installed by participants through an energy efficiency program.

(55) Standard offer contract--A contract between an energy efficiency service provider and a participating utility or between a participating utility and a commercial customer specifying standard payments based upon the amount of energy and peak demand savings achieved through energy efficiency measures, the measurement and verification protocols, and other terms and conditions, consistent with this section.

(56) Standard offer program--A program under which a utility administers standard offer contracts between the utility and energy efficiency service providers.

(57) Technical reference manual (TRM)--A resource document compiled by the commission's EM&V contractor that includes information used in program planning and reporting of energy efficiency programs. It can include savings values for measures, engineering algorithms to calculate savings, impact factors to be applied to calculated savings *(e.g.,* net-to-gross values), protocols, source documentation, specified assumptions, and other relevant material to support the calculation of measure and program savings.

(58) Verification--An independent assessment that a program has been implemented in accordance with the program design. The objectives of measure installation verification are to confirm the installation rate, that the installation meets reasonable quality standards, and that the measures are operating correctly and have the potential to generate the predicted savings. Verification activities are generally conducted during on-site surveys of a sample of projects. Project site inspections, participant phone and mail surveys and/or implementer and participant documentation review are typical activities associated with verification. Verification is also a subset of evaluation.

(d) Cost-effectiveness standard. An energy efficiency program is deemed to be cost-effective if the cost of the program to the utility is less than or equal to the benefits of the program. Utilities are encouraged to achieve demand reduction and energy savings through a portfolio of cost-effective programs that exceed each utility's energy efficiency goals while staying within the cost caps established in subsection (f)(7) of this section.

(1) The cost of a program includes the cost of incentives, measurement and verification, any shareholder bonus awarded to the utility, and actual or allocated research and development and administrative costs. The benefits of the program consist of the value of the demand reductions and energy savings, measured in accordance with the avoided costs prescribed in this subsection. The present value of the program benefits shall be calculated over the projected life of the measures installed or implemented under the program.

(2) The avoided cost of capacity is $80 per kW-year for all electric utilities through program year 2012, unless the commission establishes a different avoided cost of capacity in accordance with this paragraph. The avoided cost of capacity shall be revised beginning with program year 2013, in accordance with this paragraph.

(A) By November 15 of each year, commission staff shall post a notice of a revised avoided cost of capacity on the commission's website, on a webpage designated for this purpose, effective for the next program year. If the avoided cost of capacity has not changed, staff shall post a notice that the avoided cost of capacity remains the same.

(i) Staff shall calculate the avoided cost of capacity from the base overnight cost using the lower of a new conventional combustion turbine or a new advanced combustion turbine, as reported by the United States Department of Energy's Energy Information Administration's (EIA) Cost and Performance Characteristics of New Central Station Electricity Generating Technologies associated with EIA's Annual Energy Outlook. If EIA cost data that reflects current conditions in the industry does not exist, staff may establish an avoided cost of capacity using another data source.

(ii) If the EIA base overnight cost of a new conventional or an advanced combustion turbine, whichever is lower, is less than $700 per kW, the avoided cost of capacity shall be $80 per kW. If the base overnight cost of a new conventional or advanced combustion turbine, whichever is lower, is at or between $700 and $1,000 per kW, the avoided cost of capacity shall be $100 per kW. If the base overnight cost of a new conventional or advanced combustion turbine, whichever is lower, is greater than $1,000 per kW, the avoided cost of capacity shall be $120 per kW.

(iii) The avoided cost of capacity calculated by staff may be challenged only by the filing of a petition within 45 days of the date the avoided cost of capacity is posted on the commission's website on a webpage designated for that purpose.

(B) A utility in an area in which customer choice is not offered may petition the commission for authorization to use an avoided cost of capacity different from the avoided cost determined according to subparagraph (A) of this paragraph by filing a petition no later than 45 days after the date the avoided cost of capacity calculated by staff is posted on the commission's website on a webpage designated for that purpose. The avoided cost of capacity proposed by the utility shall be based on a generating resource or purchase in the utility's resource acquisition plan and the terms of the purchase or the cost of the resource shall be disclosed in the filing.

(3) The avoided cost of energy is $0.064 per kWh for all electric utilities through program year 2012, unless the commission establishes a different avoided cost of energy in accordance with this paragraph. The avoided cost of energy shall be revised beginning with program year 2013, in accordance with this paragraph.

(A) Commission staff shall post a notice of a revised avoided cost of energy by November 15 of each year on the commission's website, on a webpage designated for this purpose, effective for the next program year. If the cost of energy has not changed, staff shall post a notice that the cost of energy remains the same. By November 1 of each year, ERCOT shall calculate the avoided cost of energy for the ERCOT region, as defined in §25.5(48) of this title (relating to Definitions), by determining the load-weighted average of the competitive load zone settlement point prices for the peak periods covering the two previous winter and summer peaks.

(B) A utility in an area in which customer choice is not offered may petition the commission for authorization to use an

avoided cost of energy other than that otherwise determined according to this paragraph. The avoided cost of energy may be based on peak period energy prices in an energy market operated by a regional transmission organization if the utility participates in that market and the prices are reported publicly. If the utility does not participate in such a market, the avoided cost of energy may be based on the expected heat rate of the gas-turbine generating technology specified in this subsection, multiplied by a publicly reported cost of natural gas.

(e) Annual energy efficiency goals.

(1) An electric utility shall administer a portfolio of energy efficiency programs to acquire, at a minimum, the following:

(A) The utility shall acquire no less than a 25% reduction of the electric utility's annual growth in demand of residential and commercial customers for the 2012 program year.

(B) Beginning with the 2013 program year, until the trigger described in subparagraph (C) of this paragraph is reached, the utility shall acquire a 30% reduction of its annual growth in demand of residential and commercial customers.

(C) If the demand reduction goal to be acquired by a utility under subparagraph (B) of this paragraph is equivalent to at least four-tenths of 1% its summer weather-adjusted peak demand for the combined residential and commercial customers for the previous program year, the utility shall meet the energy efficiency goal described in subparagraph (D) of this paragraph for each subsequent program year.

(D) Once the trigger described in subparagraph (C) of this paragraph is reached, the utility shall acquire four-tenths of 1% of its summer weather-adjusted peak demand for the combined residential and commercial customers for the previous program year.

(E) Except as adjusted in accordance with subsection (w) of this section, a utility's demand reduction goal in any year shall not be lower than its goal for the prior year, unless the commission establishes a goal for a utility pursuant to paragraph (2) of this subsection.

(2) The commission may establish for a utility a lower goal than the goal specified in paragraph (1) of this subsection, a higher administrative spending cap than the cap specified under subsection (i) of this section, or an EECRF greater than the cap specified in subsection (f)(7) of this section if the utility demonstrates that compliance with that goal, administrative spending cap, or EECRF cost cap is not reasonably possible and that good cause supports the lower goal, higher administrative spending cap, or higher EECRF cost cap. To be eligible for a lower goal, higher administrative spending cap, or a higher EECRF cost cap, the utility must request a good cause exception as part of its EECRF application. If approved, the good cause exception is limited to the program year associated with the EECRF application.

(3) Each utility's demand-reduction goal shall be calculated as follows:

(A) Each year's historical demand for residential and commercial customers shall be adjusted for weather fluctuations, using weather data for the most recent ten years. The utility's growth in residential and commercial demand is based on the average growth in retail load in the Texas portion of the utility's service area, measured at the utility's annual system peak. The utility shall calculate the average growth rate for the prior five years.

(B) The demand goal for energy-efficiency savings for a year pursuant to paragraph (1)(A) or (B) of this subsection is calculated by applying the percentage goal to the average growth in demand, calculated in accordance with subparagraph (A) of this paragraph. The annual demand goal for energy efficiency savings pursuant to paragraph (1)(D) of this subsection is calculated by applying the percentage goal to the utility's summer weather-adjusted five-year average peak demand for the combined residential and commercial customers.

(C) A utility may submit for commission approval an alternative method to calculate its growth in demand, for good cause.

(D) If a utility's prior five-year average load growth, calculated pursuant to subparagraph (A) of this paragraph, is negative, the utility shall use the demand reduction goal calculated using the alternative method approved by the commission beginning with the 2013 program year or, if the commission has not approved an alternative method, the utility shall use the previous year's demand reduction goal.

(E) A utility shall not claim savings obtained from energy efficiency measures funded through settlement orders or count towards the bonus calculation any savings obtained from grant incentives that have been awarded directly to the utility for energy efficiency programs.

(F) Savings achieved through programs for hard-to-reach customers shall be no less than 5.0% of the utility's total demand reduction goal.

(G) Utilities may apply peak savings on a per project basis to summer or winter peak, but not to both summer and winter peaks.

(4) An electric utility shall administer a portfolio of energy efficiency programs designed to meet an energy savings goal calculated from its demand savings goal, using a 20% conservation load factor.

(5) Electric utilities shall administer a portfolio of energy efficiency programs to effectively and efficiently achieve the goals set out in this section.

(A) Incentive payments may be made under standard offer contracts, market transformation contracts, or as part of a self-delivered program for energy savings and demand reductions. Each electric utility shall establish standard incentive payments to achieve the objectives of this section.

(B) Projects or measures under a standard offer, market transformation, or self-delivered program are not eligible for incentive payments or compensation if:

(i) A project would achieve demand or energy reduction by eliminating an existing function, shutting down a facility or operation, or would result in building vacancies or the re-location of existing operations to a location outside of the area served by the utility conducting the program, except for an appliance recycling program consistent with this section.

(ii) A measure would be adopted even in the absence of the energy efficiency service provider's proposed energy efficiency project, except in special cases, such as hard-to-reach and weatherization programs, or where free riders are accounted for using a net to gross adjustment of the avoided costs, or another method that achieves the same result. A project results in negative environmental or health effects, including effects that result from improper disposal of equipment and materials.

(C) Ineligibility pursuant to subparagraph (B) of this paragraph does not apply to standard offer, market transformation, and self-delivered programs aimed at energy code adoption, implementation, compliance, and enforcement under subsection (m) of this section, nor does it preclude standard offer, market transformation, or self-delivered programs promoting energy efficiency measures also required by energy codes to the degree such codes do not achieve full compliance rates.

(D) A utility in an area in which customer choice is not offered may achieve the goals of paragraphs (1) and (2) of this subsection by:

(i) providing rebate or incentive funds directly to eligible residential and commercial customers for programs implemented under this section; or

(ii) developing, subject to commission approval, new programs other than standard offer programs and market transformation programs, to the extent that the new programs satisfy the same cost-effectiveness standard as standard offer programs and market transformation programs using the process outlined in subsection (s) of this section.

(E) For a utility in an area in which customer choice is offered, the utility may achieve the goal of this section in rural areas by providing rebate or incentive funds directly to customers after demonstrating to the commission in a contested case hearing that the goal requirement cannot be met through the implementation of programs by retail electric providers or energy efficiency service providers in the rural areas.

(f) Cost recovery. A utility shall establish an energy efficiency cost recovery factor (EECRF) that complies with this subsection to timely recover the reasonable costs of providing a portfolio of cost-effective energy efficiency programs pursuant to this section.

(1) The EECRF shall be calculated to recover:

(A) For a utility that does not collect any amount of energy efficiency costs in its base rates, the utility's forecasted annual energy efficiency program expenditures, the preceding year's over- or under-recovery that includes municipal and utility EECRF proceeding expenses, any performance bonus earned under subsection (h) of this section, and EM&V costs allocated to the utility by the commission.

(B) For a utility that collects any amount of energy efficiency in its base rates, the utility's forecasted annual energy efficiency program expenditures in excess of the actual energy efficiency revenues collected from base rates as described in paragraph (2) of this subsection, the preceding year's over- or under-recovery that includes municipal and utility EECRF proceeding expenses, any performance bonus earned under subsection (h) of this section, and EM&V costs allocated to the utility by the commission.

(2) The commission may approve an EECRF for each eligible rate class. The costs shall be directly assigned to each rate class that receives services under the programs to the maximum extent reasonably possible. In its EECRF proceeding, a utility may request a good cause exception to combine one or more rate classes, each containing fewer than 20 customers, with a similar rate class that receives services under the same energy efficiency programs. For each rate class, the under- or over-recovery of the energy efficiency costs shall be the difference between actual EECRF revenues and actual costs for that class that comply with paragraph (12) of this subsection. Where a utility collects energy efficiency costs in its base rates, actual energy efficiency revenues collected from base rates consist of the amount of energy efficiency costs expressly included in base rates, adjusted to account for changes in billing determinants from the test year billing determinants used to set rates in the last base rate proceeding.

(3) A proceeding conducted pursuant to this subsection is a ratemaking proceeding for purposes of PURA §33.023. EECRF proceeding expenses shall be included in the EECRF calculated pursuant to paragraph (1) of this subsection as follows:

(A) For a utility's EECRF proceeding expenses, the utility may include only its expenses for the immediately previous EECRF proceeding conducted under this subsection.

(B) For municipalities' EECRF proceeding expenses, the utility may include only expenses paid or owed for the immediately previous EECRF proceeding conducted under this subsection for services reimbursable under PURA §33.023(b).

(4) Base rates shall not be set to recover energy efficiency costs.

(5) If a utility recovers energy efficiency costs through base rates, the EECRF may be changed in a general rate proceeding. If a utility is not recovering energy efficiency costs through base rates, the EECRF may be adjusted only in an EECRF proceeding pursuant to this subsection.

(6) For residential customers and for commercial rate classes whose base rates do not provide for demand charges, the EECRF rates shall be designed to provide only for energy charges. For commercial rate classes whose base rates provide for demand charges, the EECRF rates shall provide for energy charges or demand charges but not both. Any EECRF demand charge shall not be billed using a demand ratchet mechanism.

(7) The total EECRF costs outlined in paragraph (1) of this subsection, excluding EM&V costs and municipal EECRF proceeding expenses shall not exceed the amounts prescribed in this paragraph unless a good cause exception filed pursuant to subsection (e)(2) of this section is granted.

(A) For residential customers for program year 2012, $0.001 per kWh; and

(B) For residential customers for program year 2013, $0.0012 per kWh;

(C) For commercial customers for program year 2012, rates designed to recover revenues equal to $0.0005 per kWh times the aggregate of all eligible commercial customers' kWh consumption; and

(D) For commercial customers for program year 2013, rates designed to recover revenues equal to $0.00075 per kWh times the aggregate of all eligible commercial customers' kWh consumption.

(E) For the 2014 program year and thereafter, the residential and commercial cost caps shall be calculated to be the prior period's cost caps increased by a rate equal to the most recently available calendar year's percentage change in the South urban consumer price index (CPI), as determined by the Federal Bureau of Labor Statistics.

(8) Not later than May 1 of each year, a utility in an area in which customer choice is not offered shall apply to adjust its EECRF effective January 1 of the following year. Not later than June 1 of each year, a utility in an area in which customer choice is offered shall apply to adjust its EECRF effective March 1 of the following year. If a utility is in an area in which customer choice is offered in some but not all parts of its service area and files one energy efficiency plan and report covering all of its service area, the utility shall apply to adjust the EECRF not later than May 1 of each year, with the EECRF effective January 1 in the parts of its service area in which customer choice is not offered and March 1 in the parts of its service area in which customer choice is offered.

(9) Upon a utility's filing of an application to establish a new EECRF or adjust an EECRF, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order

in the proceeding required by subparagraphs (A), (B), and (C) of this paragraph as follows:

(A) For a utility in an area in which customer choice is not offered, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding prior to the January 1 effective date of the new or adjusted EECRF, except where good cause supports a different procedural schedule.

(B) For a utility in an area in which customer choice is offered, the effective date of a new or adjusted EECRF shall be March 1. The presiding officer shall set a procedural schedule that will enable the utility to file an EECRF compliance tariff consistent with the final order within 10 days of the date of the final order. The procedural schedule shall also provide that the compliance filing date will be at least 45 days before the effective date of March 1. In no event shall the effective date of any new or adjusted EECRF occur less than 45 days after the utility files a compliance tariff consistent with a final order approving the new or adjusted EECRF. The utility shall service notice of the approved rates and the effective date of the approved rates by the working day after the utility files a compliance tariff consistent with the final order approving the new or adjusted EECRF to retail electric providers that are authorized by the registration agent to provide service in the utility's service area. Notice under this subparagraph may be served by email. The procedural schedule may be extended for good cause, but in no event shall the effective date of any new or adjusted EECRF occur less than 45 days after the utility files a compliance tariff consistent with a final order approving the new or adjusted EECRF, and in no event shall the utility serve notice of the approved rates and the effective date of the approved rates to retail electric providers that are authorized by the registration agent to provide service in the utility's service area more than one working day after the utility files the compliance tariff.

(C) For a utility in an area in which customer choice is offered in some but not all parts of its service area and that files one energy efficiency plan and report covering all of its service area, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding prior to the January 1 effective date of the new or adjusted EECRF for the areas in which customer choice is not offered, except where good cause supports a different schedule. For areas in which customer choice is offered, the effective date of the new or adjusted EECRF shall be March 1. The presiding officer shall set a procedural schedule that will enable the utility to file an EECRF compliance tariff consistent with the final order within 10 days of the date of the final order. The procedural schedule shall also provide that the compliance filing date will be at least 45 days before the effective date of March 1. In no event shall the effective date of any new or adjusted EECRF occur less than 45 days after the utility files a compliance tariff consistent with a final order approving the new or adjusted EECRF. The utility shall serve notice of the approved rates and the effective date of the approved rates by the working day after the utility files a compliance tariff consistent with the final order approving the new or adjusted EECRF to retail electric providers that are authorized by the registration agent to provide service in the utility's service area. Notice under this subparagraph of this paragraph may be served by email. The procedural schedule may be extended for good cause, but in no event shall the effective date of any new or adjusted EECRF occur less than 45 days after the utility files a compliance tariff consistent with a final order approving the new or adjusted EECRF, and in no event shall the utility serve notice of the approved rates and the effective date of the approved rates to retail electric providers that are authorized by the registration agent to provide service in the utility's service area more than one working day after the utility files the compliance tariff.

(D) If no hearing is requested within 30 days of the filing of the application, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding within 90 days after a sufficient application was filed; or

(E) If a hearing is requested within 30 days of the filing of the application, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding within 180 days after a sufficient application was filed. If a hearing is requested, the hearing will be held no earlier than the first working day after the 45th day after a sufficient application is filed.

(10) A utility's application to establish or adjust an EECRF shall include testimony and schedules, in Excel format with formulas intact, showing the following, by retail rate class, for the prior program year and the program year for which the proposed EECRF will be collected as appropriate:

(A) the utility's forecasted energy efficiency costs;

(B) the actual base rate recovery of energy efficiency costs, adjusted for load changes in load subsequent to the last base rate proceeding, with supporting calculations;

(C) the energy efficiency performance bonus amount that it calculates to have earned for the prior year;

(D) any adjustment for past over- or under-recovery of energy efficiency revenues;

(E) information concerning the calculation of billing determinants for the most recent year and for the year in which the EECRF is expected to be in effect;

(F) the direct assignment and allocation of energy efficiency costs to the utility's eligible rate classes, including any portion of energy efficiency costs included in base rates, provided that the utility's actual EECRF expenditures by rate class may deviate from the projected expenditures by rate class, to the extent doing so does not exceed the cost caps in paragraph (7) of this subsection;

(G) information concerning calculations related to the requirements of paragraph (7) of this subsection;

(H) the incentive payments by the utility, by program, including a list of each energy efficiency administrator and/or service provider receiving more than 5% of the utility's overall incentive payments and the percentage of the utility's incentives received by those providers. Such information may be treated as confidential;

(I) the utility's administrative costs, including any affiliate costs and EECRF proceeding expenses and an explanation of both;

(J) the actual EECRF revenues by rate class for any period for which the utility calculates an under- or over-recovery of EECRF costs;

(K) the utility's bidding and engagement process for contracting with energy efficiency service providers, including a list of all energy efficiency service providers that participated in the utility programs and contractors paid with funds collected through the EECRF. Such information may be treated as confidential;

(L) the estimated useful life used for each measure in each program, or a link to the information if publicly available; and

(M) any other information that supports the determination of the EECRF.

(11) The following factors must be included in the application, as applicable, to support the recovery of energy efficiency costs under this subsection.

(A) the costs are less than or equal to the benefits of the programs, as calculated in subsection (d) of this section;

(B) the program portfolio was implemented in accordance with recommendations made by the commission's EM&V contractor and approved by the commission and the EM&V contractor has found no material deficiencies in the utility's administration of its portfolio of energy efficiency programs. This subparagraph does not preclude parties from examining and challenging the reasonableness of a utility's energy efficiency program expenses nor does it limit the commission's ability to address the reasonableness of a utility's energy efficiency program expenses;

(C) if a utility is in an area in which customer choice is offered and is subject to the requirements of PURA §39.905(f), the utility met its targeted low-income energy efficiency requirements;

(D) existing market conditions in the utility's service territory affected its ability to implement one or more of its energy efficiency programs or affected its costs;

(E) the utility's costs incurred and achievements accomplished in the previous year or estimated for the year the requested EECRF will be in effect are consistent with the utility's energy efficiency program costs and achievements in previous years notwithstanding any recommendations or comments by the EM&V contractor;

(F) changed circumstances in the utility's service area since the commission approved the utility's budget for the implementation year that affect the ability of the utility to implement any of its energy efficiency programs or its energy efficiency costs;

(G) the number of energy efficiency service providers operating in the utility's service territory affects the ability of the utility to implement any of its energy efficiency programs or its energy efficiency costs;

(H) customer participation in the utility's prior years' energy efficiency programs affects customer participation in the utility's energy efficiency programs in previous years or its proposed programs underlying its EECRF request and the extent to which program costs were expended to generate more participation or transform the market for the utility's programs;

(I) the utility's energy efficiency costs for the previous year or estimated for the year the requested EECRF will be in effect are comparable to costs in other markets with similar conditions; or

(J) the utility has set its incentive payments with the objective of achieving its energy and demand goals at the lowest reasonable cost per program.

(12) The scope of an EECRF proceeding includes the extent to which the costs recovered through the EECRF complied with PURA §39.905 and this section, and the extent to which the costs recovered were reasonable and necessary to reduce demand and energy growth. The proceeding shall not include a review of program design to the extent that the programs complied with the energy efficiency implementation project (EEIP) process defined in subsection (s) of this section. The commission shall not allow recovery of expenses that are designated as non-recoverable under §25.231(b)(2) of this title (relating to Cost of Service). In addition, the order shall contain findings of fact regarding the following:

(A) the costs to be recovered through the EECRF are reasonable estimates of the costs necessary to provide energy efficiency programs and to meet the utility's goals under this section;

(B) calculations of any under- or over-recovery of EECRF costs is consistent with this section;

(C) any energy efficiency performance bonus for which recovery is being sought is consistent with this section;

(D) the costs assigned or allocated to rate classes are reasonable and consistent with this section;

(E) the estimate of billing determinants for the period for which the EECRF is to be in effect is reasonable;

(F) any calculations or estimates of system losses and line losses used in calculating the charges are reasonable;

(G) whether the proposed EECRF rates comply with the requirements of paragraph (7) of this subsection; and

(H) whether the proposed EECRF rates comply with the requirements of subsection (r) of this section, if the utility is in an area in which customer choice is offered.

(13) Notice of a utility's filing of an EECRF application is reasonable if the utility provides in writing a general description of the application and the docket number assigned to the application within 7 days of the application filing date to:

(A) All parties in the utility's most recent completed EECRF docket;

(B) All retail electric providers that are authorized by the registration agent to provide service in the utility's service area at the time the EECRF application is filed;

(C) All parties in the utility's most recent completed base-rate proceeding; and

(D) The state agency that administers the federal weatherization program.

(14) The utility shall file an affidavit attesting to the completion of notice within 14 days after the application is filed.

(g) Incentive payments. The incentive payments for each customer class shall not exceed 100% of avoided cost, as determined in accordance with this section. The incentive payments shall be set by each utility with the objective of achieving its energy and demand savings goals at the lowest reasonable cost per program. Different incentive levels may be established for areas that have historically been underserved by the utility's energy efficiency programs or for other appropriate reasons. Utilities may adjust incentive payments during the program year, but such adjustments must be clearly publicized in the materials used by the utility to set out the program rules and describe the programs to participating energy efficiency service providers.

(h) Energy efficiency performance bonus. A utility that exceeds its demand and energy reduction goals established in this section at a cost that does not exceed the cost caps established in subsection (f)(7) of this section shall be awarded a performance bonus calculated in accordance with this subsection. The performance bonus shall be based on the utility's energy efficiency achievements for the previous program year. The bonus calculation shall not include demand or energy savings that result from programs other than programs implemented under this section.

(1) The performance bonus shall entitle the utility to receive a share of the net benefits realized in meeting its demand reduction goal established in this section.

(2) Net benefits shall be calculated as the sum of total avoided cost associated with the eligible programs administered by the utility minus the sum of all program costs. Total avoided costs and program costs shall be calculated in accordance with this section.

(3) Beginning with the 2012 program year, a utility that exceeds 100% of its demand and energy reduction goals shall receive a bonus equal to 1% of the net benefits for every 2% that the demand reduction goal has been exceeded, with a maximum of 10% of the utility's total net benefits.

(4) The commission may reduce the bonus otherwise permitted under this subsection for a utility with a lower goal, higher administrative spending cap, or higher EECRF cost cap established by the commission pursuant to subsection (e)(2) of this section. The bonus shall be considered in the EECRF proceeding in which the bonus is requested.

(5) In calculating net benefits to determine a performance bonus, a discount rate equal to the utility's weighted average cost of capital of the utility and an escalation rate of 2% shall be used. The utility shall provide documentation for the net benefits calculation, including, but not limited to, the weighted average cost of capital, useful life of equipment or measure, and quantity of each measure implemented.

(6) The bonus shall be allocated in proportion to the program costs associated with meeting the demand and energy goals and allocated to eligible customers on a rate class basis.

(7) A bonus earned under this section shall not be included in the utility's revenues or net income for the purpose of establishing a utility's rates or commission assessment of its earnings.

(i) Utility administration. The cost of administration shall not exceed 15% of a utility's total program costs. The cost of research and development shall not exceed 10% of a utility's total program costs for the previous program year. The cumulative cost of administration and research and development shall not exceed 20% of a utility's total program costs, unless a good cause exception filed pursuant to subsection (e)(2) of this section is granted. Any portion of these costs which are not directly assignable to a specific program shall be allocated among the programs in proportion to the program incentive costs. Any bonus awarded by the commission shall not be included in program costs for the purpose of applying these limits.

(1) Administrative costs include all reasonable and necessary costs incurred by a utility in carrying out its responsibilities under this section, including:

(A) conducting informational activities designed to explain the standard offer programs and market transformation programs to energy efficiency service providers, retail electric providers, and vendors;

(B) for a utility offering self-delivered programs, internal utility costs to conduct outreach activities to customers and energy efficiency service providers will be considered administration;

(C) providing informational programs to improve customer awareness of energy efficiency programs and measures;

(D) reviewing and selecting energy efficiency programs in accordance with this section;

(E) providing regular and special reports to the commission, including reports of energy and demand savings;

(F) a utility's costs for an EECRF proceeding conducted pursuant to subsection (f) of this section;

(G) the costs paid by a utility pursuant to PURA §33.023(b) for an EECRF proceeding conducted pursuant to subsection (f) of this section; however, these costs are not included in the administrative caps applied in this paragraph; and

(H) any other activities that are necessary and appropriate for successful program implementation.

(2) A utility shall adopt measures to foster competition among energy efficiency service providers for standard offer, market transformation, and self-delivered programs, such as limiting the number of projects or level of incentives that a single energy efficiency service provider and its affiliates is eligible for and establishing funding set-asides for small projects.

(3) A utility may establish funding set-asides or other program rules to foster participation in energy efficiency programs by municipalities and other governmental entities.

(4) Electric utilities offering standard offer, market transformation, and self-delivered programs shall use standardized forms, procedures, deemed savings estimates and program templates. The electric utility shall file any standardized materials, or any change to it, with the commission at least 60 days prior to its use. In filing such materials, the utility shall provide an explanation of changes from the version of the materials that was previously used. For standard offer, market transformation, and self-delivered programs, the utility shall provide relevant documents to REPs and EESPs and work collaboratively with them when it changes program documents, to the extent that such changes are not considered in the energy efficiency implementation project described in subsection (s) of this section.

(5) Each electric utility in an area in which customer choice is offered shall conduct programs to encourage and facilitate the participation of retail electric providers and energy efficiency service providers in the delivery of efficiency and demand response programs, including:

(A) Coordinating program rules, contracts, and incentives to facilitate the statewide marketing and delivery of the same or similar programs by retail electric providers;

(B) Setting aside amounts for programs to be delivered to customers by retail electric providers and establishing program rules and schedules that will give retail electric providers sufficient time to plan, advertise, and conduct energy efficiency programs, while preserving the utility's ability to meet the goals in this section; and

(C) Working with retail electric providers and energy efficiency service providers to evaluate the demand reductions and energy savings resulting from time-of-use prices, home-area network devices, such as in home displays, and other programs facilitated by advanced meters to determine the demand and energy savings from such programs.

(j) Standard offer programs. A utility's standard offer program shall be implemented through program rules and standard offer contracts that are consistent with this section. Standard offer contracts will be available to any energy efficiency service provider that satisfies the contract requirements prescribed by the utility under this section and demonstrates that it is capable of managing energy efficiency projects under an electric utility's energy efficiency program.

(k) Market transformation programs. Market transformation programs are strategic efforts, including, but not limited to, incentives and education designed to reduce market barriers for energy efficient technologies and practices. Market transformation programs may be designed to obtain energy savings or peak demand reductions beyond savings that are reasonably expected to be achieved as a result of current compliance levels with existing building codes applicable to new buildings and equipment efficiency standards or standard offer programs. Market transformation programs may also be specifically designed to express support for early adoption, implementation, and enforcement of the most recent version of the International Energy Con-

servation Code for residential or commercial buildings by local jurisdictions, express support for more effective implementation and enforcement of the state energy code and compliance with the state energy code, and encourage utilization of the types of building components, products, and services required to comply with such energy codes. The existence of federal, state, or local governmental funding for, or encouragement to utilize, the types of building components, products, and services required to comply with such energy codes does not prevent utilities from offering programs to supplement governmental spending and encouragement. Utilities should cooperate with the REPs, and, where possible, leverage existing industry-recognized programs that have the potential to reduce demand and energy consumption in Texas and consider statewide administration where appropriate. Market transformation programs may operate over a period of more than one year and may demonstrate cost-effectiveness over a period longer than one year.

(l) Self-delivered programs. A utility may use internal or external resources to design, administer, and deliver self-delivered programs. The programs shall be tailored to the unique characteristics of the utility's service area in order to attract customer and energy efficiency service provider participation. The programs shall meet the same cost effectiveness requirements as standard offer and market transformation programs.

(m) Requirements for standard offer, market transformation, and self-delivered programs. A utility's standard offer, market transformation, and self-delivered programs shall meet the requirements of this subsection. A utility may conduct information and advertising campaigns to foster participation in standard offer, market transformation, and self-delivered programs.

(1) Standard offer, market transformation, and self-delivered programs:

(A) shall describe the eligible customer classes and allocate funding among the classes on an equitable basis;

(B) may offer standard incentive payments and specify a schedule of payments that are sufficient to meet the goals of the program, which shall be consistent with this section, or any revised payment formula adopted by the commission. The incentive payments may include both payments for energy and demand savings, as appropriate;

(C) shall not permit the provision of any product, service, pricing benefit, or alternative terms or conditions to be conditioned upon the purchase of any other good or service from the utility, except that only customers taking transmission and distribution services from a utility can participate in its energy efficiency programs;

(D) shall provide for a complaint process that allows:

(i) an energy efficiency service provider to file a complaint with the commission against a utility; and

(ii) a customer to file a complaint with the utility against an energy efficiency service provider;

(E) may permit the use of distributed renewable generation, geothermal, heat pump, solar water heater and combined heat and power technologies, involving installations of ten megawatts or less;

(F) may factor in the estimated level of enforcement and compliance with existing energy codes in determining energy and peak demand savings; and

(G) may require energy efficiency service providers to provide the following:

(i) a description of how the value of any incentive will be passed on to customers;

(ii) evidence of experience and good credit rating;

(iii) a list of references;

(iv) all applicable licenses required under state law and local building codes;

(v) evidence of all building permits required by governing jurisdictions; and

(vi) evidence of all necessary insurance.

(2) Standard offer and self-delivered programs:

(A) shall require energy efficiency service providers to identify peak demand and energy savings for each project in the proposals they submit to the utility;

(B) shall be neutral with respect to specific technologies, equipment, or fuels. Energy efficiency projects may lead to switching from electricity to another energy source, provided that the energy efficiency project results in overall lower energy costs, lower energy consumption, and the installation of high efficiency equipment. Utilities may not pay incentives for a customer to switch from gas appliances to electric appliances except in connection with the installation of high efficiency combined heating and air conditioning systems;

(C) shall require that all projects result in a reduction in purchased energy consumption, or peak demand, or a reduction in energy costs for the end-use customer;

(D) shall encourage comprehensive projects incorporating more than one energy efficiency measure;

(E) shall be limited to projects that result in consistent and predictable energy or peak demand savings over an appropriate period of time based on the life of the measure; and

(F) may permit a utility to use poor performance, including customer complaints, as a criterion to limit or disqualify an energy efficiency service provider or its affiliate from participating in a program.

(3) A market transformation program shall identify:

(A) program goals;

(B) market barriers the program is designed to overcome;

(C) key intervention strategies for overcoming those barriers;

(D) estimated costs and projected energy and capacity savings;

(E) a baseline study that is appropriate in time and geographic region. In establishing a baseline, the study shall consider the level of regional implementation and enforcement of any applicable energy code;

(F) program implementation timeline and milestones;

(G) a description of how the program will achieve the transition from extensive market intervention activities toward a largely self-sustaining market;

(H) a method for measuring and verifying savings; and

(I) the period over which savings shall be considered to accrue, including a projected date by which the market will be sufficiently transformed so that the program should be discontinued.

(4) A market transformation program shall be designed to achieve energy or peak demand savings, or both, and lasting changes in the way energy efficient goods or services are distributed, purchased, installed, or used over a defined period of time. A utility shall use fair competitive procedures to select EESPs to conduct a market transformation program, and shall include in its annual report the justification for the selection of an EESP to conduct a market transformation program on a sole-source basis.

(5) A load-control standard-offer program shall not permit an energy efficiency service provider to receive incentives under the program for the same demand reduction benefit for which it is compensated under a capacity-based demand response program conducted by an independent organization, independent system operator, or regional transmission operator. The qualified scheduling entity representing an energy efficiency service provider is not prohibited from receiving revenues from energy sold in ERCOT markets in addition to any incentive for demand reduction offered under a utility load-control standard offer program.

(6) Utilities offering load management programs shall work with ERCOT and energy efficiency service providers to identify eligible loads and shall integrate such loads into the ERCOT markets to the extent feasible. Such integration shall not preclude the continued operation of utility load management programs that cannot be feasibly integrated into the ERCOT markets or that continue to provide separate and distinct benefits.

(n) Energy efficiency plans and reports (EEPR). Each electric utility shall file by April 1 of each year an energy efficiency plan and report in a project annually designated for this purpose, as described in this subsection. The plan and report shall be filed as a searchable pdf document.

(1) Each electric utility's energy efficiency plan and report shall describe how the utility intends to achieve the goals set forth in this section and comply with the other requirements of this section. The plan and report shall be based on program years. The plan and report shall propose an annual budget sufficient to reach the goals specified in this section.

(2) Each electric utility's plan and report shall include:

(A) the utility's total actual and weather-adjusted peak demand and actual and weather-adjusted peak demand for residential and commercial customers for the previous five years;

(B) the demand goal calculated in accordance with this section for the current year and the following year, including documentation of the demand, weather adjustments, and the calculation of the goal;

(C) the utility's customers' total actual and weather-adjusted energy consumption and actual and weather-adjusted energy consumption for residential and commercial customers for the previous five years;

(D) the energy goal calculated in accordance with this section, including documentation of the energy consumption, weather adjustments, and the calculation of the goal;

(E) a description of existing energy efficiency programs and an explanation of the extent to which these programs will be used to meet the utility's energy efficiency goals;

(F) a description of each of the utility's energy efficiency programs that were not included in the previous year's plan, including measurement and verification plans if appropriate, and any baseline studies and research reports or analyses supporting the value of the new programs;

(G) an estimate of the energy and peak demand savings to be obtained through each separate energy efficiency program;

(H) a description of the customer classes targeted by the utility's energy efficiency programs, specifying the size of the hard-to-reach, residential, and commercial classes, and the methodology used for estimating the size of each customer class;

(I) the proposed annual budget required to implement the utility's energy efficiency programs, broken out by program for each customer class, including hard-to-reach customers, and any set-asides or budget restrictions adopted or proposed in accordance with this section. The proposed budget shall detail the incentive payments and utility administrative costs, including specific items for research and information and outreach to energy efficiency service providers, and other major administrative costs, and the basis for estimating the proposed expenditures;

(J) a discussion of the types of informational activities the utility plans to use to encourage participation by customers, energy efficiency service providers, and retail electric providers to participate in energy efficiency programs, including the manner in which the utility will provide notice of energy efficiency programs, and any other facts that may be considered when evaluating a program;

(K) the utility's performance in achieving its energy goal and demand goal for the prior five years, as reported in annual energy efficiency reports filed in accordance with this section;

(L) a comparison of projected savings (energy and demand), reported savings, and verified savings for each of the utility's energy efficiency programs for the prior two years;

(M) a description of the results of any market transformation program, including a comparison of the baseline and actual results and any adjustments to the milestones for a market transformation program;

(N) a description of self-delivered programs;

(O) expenditures for the prior five years for energy and demand incentive payments and program administration, by program and customer class;

(P) funds that were committed but not spent during the prior year, by program;

(Q) a comparison of actual and budgeted program costs, including an explanation of any increase or decreases of more than 10% in the cost of a program;

(R) information relating to energy and demand savings achieved and the number of customers served by each program by customer class;

(S) the utility's most recent EECRF, the revenue collected through the EECRF, the utility's forecasted annual energy efficiency program expenditures in excess of the actual energy efficiency revenues collected from base rates as described in subsection (f)(2) of this section, and the control number under which the most recent EECRF was established;

(T) the amount of any over- or under-recovery energy efficiency program costs whether collected through base rates or the EECRF;

(U) a list of any counties that in the prior year were under-served by the energy efficiency program;

(V) a calculation showing whether the utility qualifies for a performance bonus and the amount of any bonus;

(W) a description of new or discontinued programs, including pilot programs that are planned to be continued as full programs. For programs that are to be introduced or pilot programs that are to be continued as full programs, the description shall include the budget and projected demand and energy savings; and

(X) a link to the program manuals for the current program year.

(o) Review of programs. Commission staff may initiate a proceeding to review a utility's energy efficiency programs. In addition, an interested entity may request that the commission initiate a proceeding to review a utility's energy efficiency programs.

(p) Inspection, measurement and verification. Each standard offer, market transformation, and self-delivered program shall include use of an industry-accepted evaluation and/or measurement and verification protocol, such as the International Performance Measurement and Verification Protocol (IPMVP) or a protocol approved by the commission, to document and verify energy and peak demand savings to ensure that the goals of this section are achieved. A utility shall not provide an energy efficiency service provider final compensation until the provider establishes that the work is complete and evaluation and/or measurement and verification in accordance with the protocol verifies that the savings will be achieved. However, a utility may provide an energy efficiency service provider that offers behavioral programs incremental compensation as work is performed. If inspection of one or more measures is a part of the protocol, a utility shall not provide an energy efficiency service provider final compensation until the utility has conducted its inspection on at least a sample of measures and the inspections confirm that the work has been done. A utility shall provide inspection reports to commission staff within 20 days of staff's request.

(1) The energy efficiency service provider, or for self-delivered programs the utility is responsible for the determination and documentation of energy and peak demand savings using the approved evaluation and/or measurement and verification protocol, and may utilize the services of an independent third party for such purposes.

(2) Commission-approved deemed energy and peak demand savings may be used in lieu of the energy efficiency service provider's measurement and verification, where applicable. The deemed savings approved by the commission before December 31, 2007 are continued in effect, unless superseded by commission action.

(3) Where installed measures are employed, an energy efficiency service provider shall verify that the measures contracted for were installed before final payment is made to the energy efficiency service provider, by obtaining the customer's signature certifying that the measures were installed, or by other reasonably reliable means approved by the utility.

(4) For projects involving over 30 installations, a statistically significant sample of installations will be subject to on-site inspection in accordance with the protocol for the project to verify that measures are installed and capable of performing their intended function. Inspection shall occur within 30 days of notification of measure installation.

(5) Projects of less than 30 installations may be aggregated and a statistically significant sample of the aggregate installations will be subject to on-site inspection in accordance with the protocol for the projects to ensure that measures are installed and capable of performing their intended function. Inspection shall occur within 30 days of notification of measure installation.

(6) Where installed measures are employed, the sample size for on-site inspections may be adjusted for an energy efficiency service provider under a particular contract, based on the results of prior inspections.

(q) Evaluation, measurement, and verification (EM&V). The following defines the evaluation, measurement, and verification (EM&V) framework to be implemented starting in program year 2013. The goal of this framework is to ensure that the programs are evaluated, measured, and verified using a consistent process that allows for accurate estimation of energy and demand impacts.

(1) EM&V objectives include:

(A) Documenting the impacts of the utilities' individual energy efficiency and load management portfolios, comparing their performance with established goals, and determining cost-effectiveness;

(B) Providing feedback for the commission, commission staff, utilities, and other stakeholders on program portfolio performance; and

(C) Providing input into the utilities' and ERCOT's planning activities.

(2) The principles that guide the EM&V activities in meeting the primary EM&V objectives are:

(A) Evaluators follow ethical guidelines.

(B) Important and relevant assumptions used by program planners and administrators are reviewed as part of the EM&V efforts.

(C) All important and relevant EM&V assumptions and calculations are documented and the reliability of results is indicated in evaluation reports.

(D) The majority of evaluation expenditures and efforts are in areas of greatest importance or uncertainty.

(3) The commission shall select an entity to act as the commission's EM&V contractor and conduct evaluation activities. The EM&V contractor shall operate under the commission's supervision and oversight, and the EM&V contractor shall offer independent analysis to the commission in order to assist in making decisions in the public interest.

(A) Under the oversight of the commission staff and with the assistance of utilities and other parties, the EM&V contractor will evaluate specific programs and the portfolio of programs for each utility.

(B) The EM&V contractor shall have the authority to request data it considers necessary to fulfill its evaluation, measurements, and verification responsibilities from the utilities. A utility shall make good faith efforts to provide complete, accurate, and timely responses to all EM&V contractor requests for documents, data, information and other materials. The commission may on its own volition or upon recommendation by staff require that a utility provide the EM&V contractor with specific information.

(4) Evaluation activities will be conducted by the EM&V contractor, starting with activities associated with program year 2012, to meet the evaluation objectives defined in this section. Activities shall include, but are not limited to:

(A) Providing appropriate planning documents.

(B) Impact evaluations to determine and document appropriate metrics for each utility's individual evaluated programs and portfolio of all programs, annual portfolio evaluation reports, and ad-

ditional reports and services as defined by commission staff to meet the EM&V objectives.

(C) Preparation of a statewide technical reference manual (TRM), including updates to such manual as defined in this subsection.

(5) The impact evaluation activities may include the use of one or more evaluation approaches. Evaluation activities may also include, or just include, verification activities on a census or sample of projects implemented by the utilities. Evaluations may also include the use of due-diligence on utility-provided documentation as well as surveys of program participants, non-participants, contractors, vendors, and other market actors.

(6) The following apply to the development of a statewide TRM by the EM&V contractor.

(A) The EM&V contractor shall use existing Texas, or other state, deemed savings manual(s), protocols, and the work papers used to develop the values in the manual(s), as a foundation for developing the TRM. The TRM shall include applicability requirements for each deemed savings value or deemed savings calculation. The TRM may also include standardized EM&V protocols for determining and/or verifying energy and demand savings for particular measures or programs. Utilities may apply TRM deemed savings values or deemed savings calculations to a measure or program if the applicability criteria are met.

(B) The TRM shall be reviewed by the EM&V contractor at least annually, pursuant to a schedule determined by commission staff, with the intention of preparing an updated TRM, if needed. In addition, any utility or other stakeholder may request additions to or modifications to the TRM at any time with the provision of documentation for the basis of such an addition or modification. At the discretion of commission staff, the EM&V contractor may review such documentation to prepare a recommendation with respect to the addition or modification.

(C) Commission staff shall approve the initial TRM and any updated TRMs. The approval process for any TRM additions or modifications, not made during the regular review schedule determined by commission staff, shall include a review by commission staff to determine if an addition or modification is appropriate before an annual update.

(D) Any changes to the TRM shall be applied prospectively to programs offered in the appropriate program year.

(E) The TRM shall be publicly available.

(F) Utilities may use their existing deemed savings values in their 2013 program year energy efficiency plan and report, submitted in 2012, if the TRM is not available. Starting with their 2014 program year energy efficiency plan and report, submitted in 2013, utilities shall utilize the values contained in the TRM, unless the commission indicates otherwise.

(7) The utilities shall prepare projected savings estimates and claimed savings estimates. The utilities shall conduct their own EM&V activities for purposes such as confirming any incentive payments to customers or contractors and preparing documentation for internal and external reporting, including providing documentation to the EM&V contractor. The EM&V contractor shall prepare evaluated savings for preparation of its evaluation reports and a realization rate comparing evaluated savings with projected savings estimates and/or claimed savings estimates.

(8) Baselines for preparation of TRM deemed savings values or deemed savings calculations or for other evaluation activities shall be defined by the EM&V contractor and commission staff shall review and approve them. When common practice baselines are defined for determining gross energy and/or demand savings for a measure or program, common practice may be documented by market studies. Baselines shall be defined by measure category as follows (deviations from these specifications may be made with justification and approval of commission staff):

(A) Baseline is existing conditions for the estimated remaining lifetime of existing equipment for early replacement of functional equipment still within its current useful life. Baseline is applicable code, standard or common practice for remaining lifetime of the measure past the estimated remaining lifetime of existing equipment;

(B) Baseline is applicable code, standard or common practice for replacement of functional equipment beyond its current useful life;

(C) Baseline is applicable code, standard or common practice for unplanned replacements of failed equipment; and

(D) Baseline is applicable code, standard or common practice for new construction or major tenant improvements.

(9) Relevant recommendations of the EM&V contractor related to program design and reporting should be addressed in the Energy Efficiency Implementation Project (EEIP) and considered for implementation in future program years. The commission may require a utility to implement the EM&V contractor's recommendations in a future program year.

(10) The utilities shall be assigned the EM&V costs in proportion to their annual program costs and shall pay the invoices approved by the commission. The 2013 and 2014 EM&V expenses outlined in the EM&V contractor's budget shall be recovered through the EECRFs approved by the commission in the EECRF proceedings initiated by the utilities in 2013. The commission shall at least biennially review the EM&V contractor's costs and establish a budget for its services sufficient to pay for those services that it determines are economic and beneficial to be performed.

(A) The funding of the EM&V contractor shall be sufficient to ensure the selection of an EM&V contractor in accordance with the scope of EM&V activities outlined in this subsection.

(B) EM&V costs shall be itemized in the utilities' annual reports to the commission as a separate line item. The EM&V costs shall not count against the utility's cost caps or administration spending caps.

(11) For the purpose of analysis, the utility shall grant the EM&V contractor access to data maintained in the utilities' data tracking systems, including, but not limited to, the following proprietary customer information: customer identifying information, individual customer contracts, and load and usage data in accordance with §25.272(g)(1)(A) of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates). Such information shall be treated as confidential information.

(A) The utility shall maintain records for three (3) years that include the date, time, and nature of proprietary customer information released to the EM&V contractor.

(B) The EM&V contractor shall aggregate data in such a way as to protect customer, retail electric provider, and energy efficiency service provider proprietary information in any non-confidential reports or filings the EM&V contractor prepares.

(C) The EM&V contractor shall not utilize data provided or received under commission authority for any purposes out-

side the authorized scope of work the EM&V contractor performs for the commission.

(D) The EM&V contractor providing services under this section shall not release any information it receives related to the work performed unless directed to do so by the commission.

(12) For evaluation of 2012 and 2013 program years' programs and portfolios, the EM&V contractor may implement a reduced level of EM&V activities as the EM&V contractor will not be retained by the commission until after the start of the 2012 program year. Should the EM&V contractor determine that deemed savings values utilized by the utilities for program years 2012 and/or 2013 are different than values the EM&V contractor develops for the TRM, the EM&V contractor shall report two sets of impacts - one with the TRM values and one with the utilities' values for 2012 and/or 2013 program years.

(r) Targeted low income energy efficiency program. Unless funding is provided under PURA §39.903, each unbundled transmission and distribution utility shall include in its energy efficiency plan a targeted low-income energy efficiency program as described by PURA §39.903(f)(2). A utility in an area in which customer choice is not offered may include in its energy efficiency plan a targeted low-income energy efficiency program that utilizes the cost-effectiveness methodology provided in paragraph (2) of this subsection. Savings achieved by the program shall count toward the utility's energy efficiency goal.

(1) Each utility shall ensure that annual expenditures for the targeted low-income energy efficiency program are not less than 10% of the utility's energy efficiency budget for the program year.

(2) The utility's targeted low-income program shall incorporate a whole-house assessment that will evaluate all applicable energy efficiency measures for which there are commission-approved deemed savings. The cost-effectiveness of measures eligible to be installed and the overall program shall be evaluated using the Savings-to-Investment (SIR) ratio.

(3) Any funds that are not obligated after July of a program year may be made available for use in the hard-to-reach program.

(s) Energy Efficiency Implementation Project - EEIP. The commission shall use the EEIP to develop best practices in standard offer market transformation, self-directed, pilot, or other programs, modifications to programs, standardized forms and procedures, protocols, deemed savings estimates, program templates, and the overall direction of the energy efficiency program established by this section. Utilities shall provide timely responses to questions posed by other participants relevant to the tasks of the EEIP. Any recommendations from the EEIP process shall relate to future years as described in this subsection.

(1) The following functions may also be undertaken in the EEIP:

(A) development, discussion, and review of new statewide standard offer programs;

(B) identification, discussion, design, and review of new market transformation programs;

(C) determination of measures for which deemed savings are appropriate and participation in the development of deemed savings estimates for those measures;

(D) review of and recommendations on the commission EM&V contractor's reports;

(E) review of and recommendations on incentive payment levels and their adequacy to induce the desired level of participation by energy efficiency service providers and customers;

(F) review of and recommendations on a utility annual energy efficiency plans and reports;

(G) utility program portfolios and proposed energy efficiency spending levels for future program years;

(H) periodic reviews of the cost-effectiveness methodology; and

(I) other activities as identified by commission staff.

(2) The EEIP projects shall be conducted by commission staff. The commission's EM&V contractor's reports shall be filed in the project at a date determined by commission staff.

(3) A utility that intends to launch a program that is substantially different from other programs previously implemented by any utility affected by this section shall file a program template and shall provide notice of such to EEIP participants. Notice to EEIP participants need not be provided if a program description or program template for the new program is provided through the utility's annual energy efficiency report. Following the first year in which a program was implemented, the utility shall include the program results in the utility's annual energy efficiency report.

(4) Participants in the EEIP may submit comments and reply comments in the EEIP on dates established by commission staff.

(5) Any new programs or program redesigns shall be submitted to the commission in a petition in a separate proceeding. The approved changes shall be available for use in the utilities' next EEPR and EECRF filings. If the changes are not approved by the commission by November 1 in a particular year, the first time that the changes shall be available for use is the second EEPR and EECRF filings made after commission approval.

(6) Any interested entity that participates in the EEIP may file a petition to the commission for consideration regarding changes to programs.

(t) Retail providers. Each utility in an area in which customer choice is offered shall conduct outreach and information programs and otherwise use its best efforts to encourage and facilitate the involvement of retail electric providers as energy efficiency service companies in the delivery of efficiency and demand response programs.

(u) Customer protection. Each energy efficiency service provider that provides energy efficiency services to end-use customers under this section shall provide the disclosures and include the contractual provisions required by this subsection, except for commercial customers with a peak load exceeding 50 kW. Paragraph (1) of this subsection does not apply to behavioral energy efficiency programs that do not require a contract with a customer.

(1) Clear disclosure to the customer shall be made of the following:

(A) the customer's right to a cooling-off period of three business days, in which the contract may be canceled, if applicable under law;

(B) the name, telephone number, and street address of the energy efficiency services provider and any subcontractor that will be performing services at the customer's home or business;

(C) the fact that incentives are made available to the energy efficiency services provider through a program funded by utility customers, manufacturers or other entities and the amount of any incentives provided by the utility;

(D) the amount of any incentives that will be provided to the customer;

(E) notice of provisions that will be included in the customer's contract, including warranties;

(F) the fact that the energy efficiency service provider must measure and report to the utility the energy and peak demand savings from installed energy efficiency measures;

(G) the liability insurance to cover property damage carried by the energy efficiency service provider and any subcontractor;

(H) the financial arrangement between the energy efficiency service provider and customer, including an explanation of the total customer payments, the total expected interest charged, all possible penalties for non-payment, and whether the customer's installment sales agreement may be sold;

(I) the fact that the energy efficiency service provider is not part of or endorsed by the commission or the utility; and

(J) a description of the complaint procedure established by the utility under this section, and toll free numbers for the Office of Customer Protection of the Public Utility Commission of Texas, and the Office of Attorney General's Consumer Protection Hotline.

(2) The energy efficiency service provider's contract with the customer, where such a contract is employed, shall include:

(A) work activities, completion dates, and the terms and conditions that protect residential customers in the event of non-performance by the energy efficiency service provider;

(B) provisions prohibiting the waiver of consumer protection statutes, performance warranties, false claims of energy savings and reductions in energy costs;

(C) a disclosure notifying the customer that consumption data may be disclosed to the EM&V contractor for evaluation purposes; and

(D) a complaint procedure to address performance issues by the energy efficiency service provider or a subcontractor.

(3) When an energy efficiency service provider completes the installation of measures for a customer, it shall provide the customer an "All Bills Paid" affidavit to protect against claims of subcontractors.

(v) Grandfathered programs. An electric utility that offered a load management standard offer program for industrial customers prior to May 1, 2007 shall continue to make the program available, at 2007 funding and participation levels, and may include additional customers in the program to maintain these funding and participation levels.

(w) Identification notice. An industrial customer taking electric service at distribution voltage may submit a notice identifying the distribution accounts for which it qualifies under subsection (c)(30) of this section. The identification notice shall be submitted directly to the customer's utility. An identification notice submitted under this section must be renewed every three years. Each identification notice must include the name of the industrial customer, a copy of the customer's Texas Sales and Use Tax Exemption Certification (pursuant to Tax Code §151.317), a description of the industrial process taking place at the consuming facilities, and the customer's applicable account number(s) or ESID number(s). The identification notice is limited solely to the metered point of delivery of the industrial process taking place at the consuming facilities. The account number(s) or ESID number(s) identified by the industrial customer under this section shall not be charged for any costs associated with programs provided under this section, including any shareholder bonus awarded; nor shall the identified facilities be eligible to participate in utility-administered energy efficiency programs during the term. Beginning with the 2013 program year, notices shall be submitted not later than February 1 to be effective for the following program year. A utility's demand reduction goal shall be adjusted to remove any load that is lost as a result of this subsection.

(x) Administrative penalty. The commission may impose an administrative penalty or other sanction if the utility fails to meet a goal for energy efficiency under this section. Factors, to the extent they are outside of the utility's control, that may be considered in determining whether to impose a sanction for the utility's failure to meet the goal include:

(1) the level of demand by retail electric providers and energy efficiency service providers for program incentive funds made available by the utility through its programs;

(2) changes in building energy codes; and

(3) changes in government-imposed appliance or equipment efficiency standards.

(y) Effective date. The effective date of this section is January 1, 2013.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 11, 2012.

TRD-201205312
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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Proposal publication date: April 27, 2012
For further information, please call: (512) 936-7223

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 39. PRIMARY HEALTH CARE SERVICES PROGRAM

SUBCHAPTER B. TEXAS WOMEN'S HEALTH PROGRAM

25 TAC §§39.31 - 39.45

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), adopts new §§39.31 - 39.45 concerning the Texas Women's Health Program (TWHP). The following sections are adopted without changes to the proposed text as published in the July 6, 2012, issue of the *Texas Register* (37 TexReg 5074) and will not be republished: §39.31, Introduction; §39.32, Non-entitlement and Availability; §39.34, Client Eligibility; §39.36, Financial Eligibility Requirements; §39.37, Denial, Suspension, or Termination of Services; Client Appeals; §39.39, Covered Services; §39.40, Non-covered Services; §39.42, Provider's Request for Review of Claim Denial; §39.43, Confidentiality; and §39.44, Audits; Reports.

The following sections are adopted with changes to the proposed text as published in the July 6, 2012, issue of the *Texas Register* (37 TexReg 5074) and will be republished: §39.33, Definitions; §39.35, Application Procedures; §39.38, Health-Care Providers; §39.41, Reimbursement; and §39.45, Severability.

The changes respond to comments received and do not materially alter issues raised by a proposed rule. Accordingly, HHSC, on behalf of DSHS, may adopt the new text without republishing as a proposed rule. *See Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex.,* 136 S.W.3d 643, 650 (Tex. 2003); *Tex. Med. Ass'n v. Tex. Worker's Comp. Comm'n,* 137 S.W.3d 342, 355 (Tex. App.-Austin 2004, no writ); *State Bd. of Ins. v. Deffebach,* 631 S.W.2d 794, 801 (Tex. App.-Austin 1982, writ ref'd n.r.e.).

Background and Justification

In 2005, the Texas Legislature enacted Human Resources Code §32.0248, which directed HHSC to seek a five-year Medicaid demonstration waiver to implement a project to expand access to preventive health and family planning services for non-pregnant, non-sterile women who were not eligible to receive Medicaid services but who, following pregnancy, would be presumptively eligible for Medicaid services along with their newborn infants. In accordance with the statutory directive, HHSC requested a waiver from the Secretary of Health and Human Services pursuant to section 1115 of the Social Security Act (42 U.S.C. §1315). The Secretary approved the request for a five-year period beginning December 21, 2006. Human Resources Code §32.0248 expired by its terms on September 1, 2011.

The 82nd Texas Legislature enacted two laws to govern the Medicaid Women's Health Program or a successor to that program following the expiration of Human Resources Code §32.0248. The first was a contingency rider to the General Appropriations Act (Rider 62 to Article II) that instructs HHSC to continue providing Women's Health Program services contingent upon the federal Centers for Medicare and Medicaid Services (CMS) granting a waiver. The second law was an amendment to Human Resources Code §32.024, which requires HHSC to ensure that any funds spent for purposes of the Medicaid Women's Health Program "or a similar successor program is not be used to perform or promote elective abortions, or to contract with entities that perform or promote elective abortions or affiliate with entities that perform or promote elective abortions." Tex. Hum. Res. Code §32.024(c-1).

HHSC submitted a request to CMS to renew the demonstration project waiver in the fall of 2011. The waiver renewal notified CMS that HHSC intended to implement the requirements of state law in administering the program. Those requirements were codified in administrative rules that HHSC proposed in September 2011. The proposed rules established qualifications for providers to participate in the Medicaid Women's Health Program. The proposed rules disqualified a provider that performs or promotes elective abortions or that affiliates with another entity that performs or promotes elective abortions from participating in the program.

CMS notified HHSC in December 2011 that it would not approve the waiver renewal application if HHSC adopted the proposed limitations on provider participation. CMS agreed to extend the waiver to permit CMS and HHSC to resolve CMS' objection to HHSC's proposed policy. The Medicaid Women's Health Program is, as of the date of the order adopting these rules, still operating.

HHSC adopted the proposed rules, effective March 14, 2012. On March 15, 2012, CMS denied HHSC's waiver renewal application and requested a plan to transition clients of the Medicaid Women's Health Program to other services, if available.

Following the CMS denial, Governor Rick Perry directed the Executive Commissioner of HHSC to develop a plan to implement a program funded by state general revenue to replace the Medicaid Women's Health Program. That plan proposed placing the general revenue-funded program within the DSHS Preventive and Primary Care Unit's (PPCU) Primary Health Care Services Program. The Primary Health Care Services Program is operated in accordance with Health and Safety Code Chapter 31, which authorizes DSHS to establish a primary health care services program to provide to eligible individuals primary health care services, including family planning services and health screenings. The new program was named the Texas Women's Health Program and will be funded by general revenue originally appropriated to HHSC consisting of (1) general revenue appropriated to fund the Medicaid Women's Health Program; (2) administrative savings resulting from unexpended appropriations for the completed Texas Integrated Eligibility and Redesign System (TIERS); (3) general revenue savings resulting from a targeted hiring freeze; and (4) the general revenue share of collections of Medicaid fraud, abuse, and waste. HHSC received approval of the Legislative Budget Board to transfer such funds for this purpose in May 2012.

These rules are intended to transition the Medicaid Women's Health Program to the TWHP, operated by DSHS or its designee through the DSHS PPCU Primary Health Care Services Program. DSHS has determined that, in light of the federal government's denial of the State's request to extend the Medicaid Women's Health Program waiver and its decision to terminate federal funding for this purpose, there is a need for the services that this program will provide across the state, as directed by Health and Safety Code §31.003(d). DSHS further has determined that the classes of women who will be served may be, without the establishment of the TWHP, unable to obtain the preventive health care, contraceptives, and screenings this program will provide. As a consequence, the State would require more funds to pay Medicaid costs for prenatal care, births, and health-care problems that might otherwise be averted or minimized.

Comments

DSHS and HHSC have reviewed and prepared responses to comments received regarding the proposed rules during the comment period and during the public hearing held on September 4, 2012.

DSHS received comments in support of the proposed Texas Women's Health Program rules, either whole or in part, from the following entities: And Then There Were None; San Antonio Coalition for Life; Texas Alliance for Life; and Texas Right to Life.

DSHS received comments opposed to the proposed TWHP rules, either in whole or in part, from the following entities: Texas Planned Parenthood; American Civil Liberties Union of Texas; League of Women Voters of Texas; Texas Policy Evaluation Project; Legacy Community Health Services; National Council of Jewish Women, Austin Section; NARAL Pro-Choice of Texas; Texas Medical Association (TMA); Texas Association of Obstetricians and Gynecologists (TAOG); Texas Academy of Family

Physicians (TAFP); American Congress of Obstetricians and Gynecologists (ACOG); Texas Pediatric Society (TPS); Center for Public Policy Priorities (CPPP); Healthy Futures Alliance; and People's Community Clinic.

DSHS received comments from the following entities requesting changes to the proposed TWHP rules: Texas Association of Community Health Centers (TACHC) and Texas Hospital Association (THA).

Numerous comments also were received from interested individuals.

In general, the comments received related either to the sufficiency of the Preamble to the proposed rules or the substance of the rules itself.

Comments Received on the Adoption Preamble

Several comments suggest that the Preamble to the proposed rules did not fully comply with requirements in the Administrative Procedure Act, Government Code Chapter 2001. Government Code §2001.024(a) lists the items that must be included in an agency's notice of a proposed rule. Among other things, §2001.024(a) requires:

(3) a statement of the statutory or other authority under which the rule is proposed to be adopted, including:

(A) a concise explanation of the particular statutory or other provisions under which the rule is proposed;

...

(4) a fiscal note...stating for each year of the first five years that the rule will be in effect:

(A) the additional estimated cost to the state and to local governments expected as a result of enforcing or administering the rule;

...

(C) the estimated loss or increase in revenue to the state or to local governments as a result of enforcing or administering the rule; and

(D) if applicable, that enforcing or administering the rule does not have foreseeable implications relating to cost or revenues of the state or local governments;

(5) a note about public benefits and costs...for each year of the first five years that the rule will be in effect....

Adoption Preamble: Background and Justification

Comment: A commenter stated that the Preamble is insufficient because it fails to indicate (1) that the rules governing the Medicaid Women's Health Program are the subject of a lawsuit; (2) that CMS denied the State's request to extend the Medicaid Women's Health Program because, according to the commenter, the rules would exclude Planned Parenthood from participating; and (3) several other matters related to the pending litigation and the Medicaid Women's Health Program.

Response: The comments refer to administrative rules codified at 1 TAC §§354.1361 - 354.1364 that currently govern the Medicaid Women's Health Program administered by HHSC and not to the rules that are the subject of this adoption, which pertain to the TWHP. The specific deficiencies alleged by the commenter are not requirements of the notice provisions of the Administrative Procedure Act. Further, pending litigation involving another state agency is not an appropriate subject for a rule adoption. For these reasons, DSHS is unable to respond to these comments.

Comment: A commenter suggested that the notice was insufficient because it failed to acknowledge that the rules would effectively violate Rider 52 of the DSHS portion of the General Appropriations Act for the 2012-2013 fiscal years. *See* General Appropriations Act, 82nd Leg., R.S., ch. 1355, art. II, rider 52, at II-64 to II-65 (Health and Human Services section, DSHS). Under that rider, an entity otherwise eligible to receive funds under the DSHS Strategy B.1.3, entitled "Family Planning Services," will not be disqualified from receiving the funds because it affiliates with an entity that performs elective abortions if the affiliation complies with standards set out in the rider.

Response: DSHS respectfully disagrees. Rider 52 applies to funds that were appropriated to the DSHS under Strategy B.1.3. As noted previously, the funds that will be used to operate the TWHP are derived from appropriations to HHSC and will not be expended pursuant to DSHS Strategy B.1.3. It was therefore unnecessary to refer to Rider 52 in the notice for the TWHP rules.

Comment: A commenter alleged that the Preamble is insufficient because DSHS has no statutory authority, under either the Health and Safety Code or the Human Resources Code, to abandon the federally subsidized Medicaid Women's Health Program.

Response: This comment, too, refers to the Medicaid Women's Health Program, over which DSHS has no authority. Furthermore, the Administrative Procedure Act does not require a state agency, in either the proposal or adoption of an administrative rule, to explain another state agency's or the federal government's actions. As noted in the Background and Justification section above, the federal government, not the State, elected to terminate federal funding for the Medicaid Women's Health Program. The conditions prescribed by the federal government left the State with three choices: (1) operate the Program in contravention of state law (Human Resources Code §32.024(c-1)); (2) discontinue the Program entirely; or (3) replace the Program with a wholly state-funded program that could be operated consistently with State law. And as the Preamble explains, the State elected to pursue the third option, and DSHS has sufficient authority under state law to operate a fully state-funded family planning program offering the services currently provided by the Medicaid Women's Health Program.

The published Preamble for the proposed rules listed, as general authority, Health and Safety Code §12.001 and §1001.071. Section 12.001 authorizes DSHS generally to supervise and control "all matters relating to the health of the citizens of this state" and HHSC, on behalf of DSHS, to adopt rules relating to the performance of DSHS' statutory duties. Section 1001.071 designates DSHS as the agency responsible for administering public health programs, with authority to, among other things, implement its public health care delivery programs; provide health care services; provide for the prevention and control of communicable diseases; educate the public on health-related matters; and act as the lead agency to implement state policies and programs relating to the human immunodeficiency virus and acquired immunodeficiency syndrome.

The published Preamble listed, as specific authority, Health and Safety Code §§31.002(a)(4)(C) and (H), 31.003, and 31.004. Taken together, these sections explicitly authorize DSHS to establish a program to provide primary health care services, including family planning, to eligible individuals and to adopt rules to govern and administer the program. These statutes plainly pro-

vide adequate authority for DSHS to establish the TWHP within its primary health care program.

Comment: Similarly, a commenter stated that the Preamble is insufficient because the creation of a new, state-funded TWHP will violate Rider 62 of the HHSC's portion of article II of the current General Appropriations Act. See General Appropriations Act, 82nd Leg., R.S., ch 1355, art. II, rider 62, at II-95 (Health and Human Services section, HHSC). Rider 62 states that the HHSC "shall" provide Women's Health Program services "under Medicaid" out of funds appropriated to the HHSC under "Goal B, Medicaid," contingent upon receiving a waiver from the CMS under §1115 of the Social Security Act.

Response: By its plain terms, Rider 62 does not apply to the TWHP. Rider 62 expressly applies to a women's health program that is funded through Medicaid (i.e., the current Medicaid Women's Health Program), but it does not apply to the TWHP, which is not funded through Medicaid and is not contingent upon the approval of the federal CMS. The comment, therefore, does not relate to the proposed rules, and it would be inappropriate for DSHS to presume that Rider 62 applies to the program established under the adopted rules.

Comment: Other comments express disagreement with the policy behind the State's decision to operate the TWHP as a fully state-funded program, outside the federally subsidized Medicaid program.

Response: Because these comments are not directed to the rules per se, but to a decision of officials that are outside the scope of the adopted rules, it is inappropriate for DSHS to respond to these comments.

Comment: A commenter stated that Texas law does not protect unborn life, and commented that redirecting money from protecting women's health to unborn life is not consistent with the Texas Constitution and statutes.

Response: The commenter did not specify which provision of the Texas Constitution or Texas law the proposed rules allegedly violate. In the absence of such information, DSHS can only speculate that the commenter believes either that the proposed method of finance for the TWHP violates the state constitution or state law or that the purpose for which the supposed transfer of funds is illegal or unconstitutional.

Article VIII, §6 of the Texas Constitution provides in pertinent part that, "No money shall be drawn from the Treasury but in pursuance of specific appropriations made by law." As noted above, the funds for the TWHP will come from transfers from other HHSC programs. These transfers were requested and approved pursuant to the General Appropriations Act.

The General Appropriations Act is a law for purposes of Article VIII, §6 of the Texas Constitution. Rider 12 to the HHSC appropriation provides, "Transfers may not be made from appropriation items in Goal B to appropriation items in other goals without prior written approval from the Legislative Budget Board and the Governor." General Appropriations Act, 82nd Leg., R.S., ch. 1355 (H.B. 1), art. II, §12.a.(1) at II-85. Rider 35 to the HHSC appropriation conditions use of unexpended balances of general revenue appropriated for integrated eligibility and enrollment services on similar approvals. *See id.* Art. II, §35 at II-92.

HHSC sought and received such approvals. See Letter from Thomas M. Suehs, Executive Commissioner, HHSC, to Jonathan Hurst, Director, Governor's Office of Budget, Planning and Policy, and Ursula Parks, Acting Director, Legislative Budget Board (May 3, 2012) (requesting approval of the proposed transfer of funds from HHSC to DSHS); Letter from Ursula Parks, Acting Director, Legislative Budget Board, to Thomas Suehs, Executive Commissioner, HHSC (May 31, 2012) (approving HHSC's request). Accordingly, the proposed method of finance for the TWHP on its face complies with statutory and constitutional requirements.

Furthermore, DSHS believes that the proposed transfer of funds is for a bona fide statutory purpose--specifically, the delivery of primary and preventive health care services to non-pregnant women under Health and Safety Code Chapter 31, in a manner that complies with the legislative mandate in Human Resources Code §32.024(c-1). Consequently, DSHS respectfully disagrees with the comment.

Comment: A commenter suggested that the Preamble is insufficient because it fails to acknowledge that the Legislature has not appropriated any funds for the TWHP.

Response: DSHS disagrees with the comment. DSHS is not aware of a legal principle that would prohibit a state administrative agency from adopting rules to regulate activities that are within the agency's authority but for which the Legislature has not directly appropriated funds. Neither is DSHS aware of an exception to notice and comment rulemaking for such programs.

To the contrary, DSHS believes that Texas law requires the agency to conduct a rulemaking for the programs that the agency intends to administer, even if the Legislature has not appropriated funds directly to the agency for this purpose. For example, some programs are administered by a state agency without appropriated funds. *See, e.g.,* 1 TAC §355.8070(e)(1) (supplemental Medicaid payments to private hospitals are limited to and obtained through funds transferred from a governmental entity to HHSC). Yet these programs are subject to the rulemaking requirements of the Administrative Procedure Act.

Furthermore, the response to the previous comment demonstrates that the proposed method of finance for the TWHP complies with the requirements of the General Appropriations Act.

Adoption Preamble: Fiscal Note

Comment: Several comments focus on the Preamble's Fiscal Note, which projected the fiscal impact of the rule for only three years, as opposed to the five years required by the Administrative Procedure Act. The Fiscal Note stated that the estimate of fiscal impact was premised on the assumption that TWHP clients would become eligible for Medicaid as a result of expanded Medicaid eligibility standards that are scheduled to take effect at the federal level in January 2014. July 6, 2012 issue of the *Texas Register* (37 TexReg 5074, 5076). The comments suggest that the Fiscal Note does not comply with the Administrative Procedure Act and is inconsistent with a decision by state leadership not to participate in the Medicaid expansion.

Response: Section 2001 of the federal Patient Protection and Affordable Care Act of 2010 ("PPACA") expands eligibility for Medicaid services beginning January 1, 2014, to individuals who currently are ineligible for coverage: specifically, persons under the age of 65 (ages 19 - 64) who are not eligible for a current Medicaid program and:

- have incomes under 133 percent of the federal poverty limit (FPL);

- meet citizenship requirements;

- are not incarcerated; and

- are not entitled to Medicare.

42 U.S.C. §1396a(a)(10)(A)(i)(VIII). Under the PPACA, the federal government will cover 100 percent of the costs of coverage for these newly eligible individuals for three years. In 2017, the federal government will pay 95 percent of the cost; in 2020, the percentage drops to 90 percent.

DSHS submitted the proposed rules for publication to the Secretary of State on June 25, 2012, for publication in the July 6, 2012, issue of the *Texas Register.* Three days later, the United States Supreme Court issued its decision in *National Federation of Independent Business v. Sibelius,* 132 S.Ct. 2566 (2012). The Court determined, among other things, that a state could opt out of the expansion of the Medicaid program without jeopardizing federal participation in the state's existing Medicaid program. *See Nat'l Fed'n of Indep. Bus. v. Sibelius,* 132 S. Ct. 2566, 2601-07 (2012). Following that decision, but before the publication of the proposed TWHP rules in the *Texas Register,* Governor Perry announced the State's intention to decline the Medicaid expansion.

Consequently, at the time the TWHP proposed rules were approved for publication and submitted to the *Texas Register,* women who would be eligible for TWHP would have become eligible for Medicaid on January 1, 2014, and the federal government would have borne 100 percent of the costs of their care. The fiscal note to the proposed rules, therefore, correctly estimated the fiscal impact to the state for the five-year period beginning on the effective date of the rules.

In light of the changed circumstances following the approval of the proposed rules for publication, DSHS has elected to revise the Fiscal Note to reflect maintenance of Medicaid eligibility at current levels.

The revised Fiscal Note is supplied in the section headed "Fiscal Note" found in this preamble.

Comment: A commenter stated that the Preamble is insufficient because it fails to address costs counties may have to incur to make up the loss of access to state-funded family planning.

Response: As published, the Preamble to the Proposed Rules, as well as the revised Fiscal Note above, states that local governments will not incur additional costs in the enforcement or administration of the rules. Nothing in the rules requires a county to establish a family-planning program; thus, no discussion of required costs is warranted. In addition, the Administrative Procedure Act does not require that the Preamble discuss whether any county will opt to establish or supplement its own family-planning program, and the costs a county may incur if it does so.

Comment: A commenter stated that the Preamble is insufficient because the funds necessary to implement the TWHP must be transferred from the HHSC to DSHS, which, according to the commenter, is not allowed by Rider 12 to the HHSC's portion of article II of the General Appropriations Act. *See* General Appropriations Act, 82nd Leg., R.S., ch. 1355, art. II, rider 12, at II-79 to II-81 (Health and Human Services section, HHSC).

Response: The commenter's assumptions are incorrect. As already noted, the funds for the TWHP will come from transfers from other HHSC programs, and HHSC has received the approval of the Legislative Budget Board and Governor to make the transfers in accordance with the General Appropriations Act and, by extension, Article VIII of the Texas Constitution. See Letter from Thomas M. Suehs, Executive Commissioner, Texas HHSC, to Jonathan Hurst, Director, Governor's Office of Budget, Planning and Policy, and Ursula Parks, Acting Director, Legislative Budget Board (May 3, 2012); Letter from Ursula Parks, Acting Director, Legislative Budget Board, to Thomas Suehs, Executive Commissioner, HHSC (May 31, 2012).

Comment: A comment suggests that the Preamble's Fiscal Note is insufficient because it fails to include increased costs to the State for prenatal care and births, which the commenter believes will increase if family planning services are difficult to access under the TWHP.

Response: This comment requires DSHS to assume that the TWHP will fail to serve enough women to avoid an increase in births among women who might be eligible but who do not receive services from the program. DSHS is unaware of a requirement under the Administrative Procedure Act or other law that obligates a state agency to estimate the indirect costs to the state of underutilization of a state program. As indicated previously, DSHS believes the State will benefit in the long term from implementing the TWHP. Those savings are estimated in the Public Benefit statement, a revised version of which follows the revised Fiscal Note Section.

Adoption Preamble: Public benefit

Just as the Fiscal Note in the proposed Preamble was limited to a three-year forecast, so too was the statement of Public Benefit.

The revised statement of Public Benefit is in the section headed "Public Benefit," which follows the revised Fiscal Note Section.

Adoption Preamble: Statutory Authority

Comment: Commenters alleged that the Preamble is insufficient because it does not acknowledge that DSHS lacks authority to appropriate by rule the funds necessary to operate the TWHP from 2014 through 2018.

Response: This comment appears to assume that an administrative agency must assure or effect an appropriation of funds that will enable future administration of an activity contemplated under proposed rules. This is incorrect. The appropriation of funds is a legislative matter, and the obligations of administrative agencies are contingent upon the exercise of legislative discretion to appropriate sufficient funds to enable the agency to administer its programs. *See Hawkins v. Dallas County Hospital Dist.,* 150 S.W.2d 535, n. 10 (if the legislature did not provide the appropriate amount of funding to administer a program, the problem is that the legislature created an "unfunded mandate," a grievance that is most appropriately brought to the legislature, not the courts), *citing Socorro Indep. Sch. Dist. v. State Bd. of Educ.,* 968 S.W.2d 547, 553 (Tex.App.-Austin 1998, pet. denied); *Mutchler v. Texas Dep't of Public Safety,* 681 S.W.2d 282, 285 (Tex.App.-Austin 1984, no writ).

As already noted, the Administrative Procedure Act requires the fiscal note for a proposed rule to forecast costs for the first five years the rule is effective. It is a given that, within any legislative session that occurs within the five-year period forecast in a preamble, the Legislature could otherwise direct the use of those funds. An administrative agency has only those powers that the Legislature has delegated to it. *See State v. Jackson,* 376 S.W.2d 341, 344 -345 (Tex. 1965) (citing *Stauffer v. City of San Antonio,* 344 S.W.2d 158, 160 (Tex. 1961); *Brown v. Humble Oil and Refining Co.,* 83 S.W.2d 935, 940-41 (Tex. 1935)). And the Legislature may withdraw powers it has delegated to any agency or may preempt an administrative agency's decision by enacting contrary legislation. *See id.*

Comment: A commenter suggested that Preamble is insufficient because it does not explain how the statutory authority cited authorizes DSHS to adopt these rules.

Response: The duty of a state agency to adopt administrative arises from the terms of the Administrative Procedure Act, which requires an administrative agency to adopt as an administrative rule a statement of general applicability that purports to implement law or prescribe procedure. *See El Paso County Hosp. Dist. v. Texas Health and Human Service Comm'n,* 247 S.W.3d 709, 714 (Tex. 2008). The Administrative Procedure Act, moreover, requires a preamble to a proposed rule to state the statutory authority that authorizes the adoption of a proposed rule, including a "concise explanation" of the statutory provisions and the statute affected by the rules. Tex. Gov't Code §2001.024(a)(3). DSHS believes that the statutes cited in the Preamble and the explanation of those provisions are consistent with the Administrative Procedure Act's requirements.

Comments Received Regarding the Proposed Rules

Comment: With respect to the rules generally, commenters expressed concern that the rules would make the health services offered through the TWHP inaccessible to many women, which might in turn lead to an increase in the number of pregnancies. The commenters believe that the rules will render many providers in the Medicaid Women's Health Program unqualified to participate in TWHP and that the providers remaining in the program will be unable to handle a greatly increased number of TWHP clients in a timely manner. Some commenters suggested that, for this reason, rules restricting provider participation should not be adopted.

Response: DSHS appreciates the comments; however, these concerns cannot authorize DSHS to operate the TWHP in a manner that violates Human Resources Code §32.024(c-1) and allows unqualified providers to participate in the program. Further, the State's efforts have been directed at ensuring women's access to covered services. While some women enrolled in the existing Medicaid Women's Health Program will have to switch providers, DSHS believes the women will find a new provider within a reasonable distance and geographic range. DSHS will assist all eligible women whose existing provider is not qualified to participate in the TWHP. Additionally, DSHS will monitor access issues and work to recruit new providers, particularly in those areas where access may be difficult.

Comment: A commenter suggested, in the alternative, that DSHS delay implementing the rules while the rules governing the Medicaid Women's Health Program are challenged in court and while the State is appealing the CMS' decision to deny the State's request to extend the Medicaid Women's Health Program.

Response: DSHS appreciates the comment; however, the agency is unable to delay adoption of the rules. In light of the CMS' denial of the State's request to extend the Medicaid Women's Health Program, and to avoid as much as possible any interruption in care to the women currently served by the program, the State has determined that it is necessary to continue to provide these vital services, even if it occurs exclusively at the State's expense. As successor to the Medicaid Women's Health Program, DSHS must comply with the Legislature's direction to deliver services through providers that do not perform or promote elective abortions or affiliate with an entity that performs or promotes elective abortions. To ensure a seamless transition for clients from the Medicaid program to the TWHP, DSHS believes that it must move forward with the adoption of the rules.

Comment: A commenter suggested that the rule should incorporate by reference or repeat the text of Government Code §531.0025, which the Texas Legislature adopted in 2011 to limit the use of funds appropriated to the DSHS. *See* Act of June 27, 2011, 82nd Leg., 1st C.S., ch. 7, §1.19(a) (S.B. 7). Under the statute and "[n]otwithstanding any other law," unless the Legislature has directed otherwise in the appropriations act, the DSHS generally must award money that has been appropriated to it for the purpose of providing family planning services "to eligible entities in the following order of descending priority:" first, to public entities that provide family planning services; second, to nonpublic entities that provide comprehensive primary and preventive care services, not just family planning services; and third, to nonpublic entities that provide family planning services but do not provide comprehensive primary and preventive care services. Tex. Gov't Code §531.0025(a).

Response: DSHS appreciates the comment; however, by its terms, the statute does not apply to the TWHP because the funds that will be used to administer the TWHP were not appropriated to DSHS for the purpose of providing family planning services. DSHS believes that this is a matter that is more appropriately addressed to the Legislature.

§39.31. Introduction.

Comment: Commenters suggested that the list of objectives in §39.31(c) be modified to add, as an objective, the provision of accessible and comprehensive reproductive health care for low-income women. One commenter suggests that the addition of such an objective will clarify the intent to provide continued access to preventive health care, contraceptives, and screenings.

Response: DSHS declines to add the requested objective. Section 39.39 and §39.40 of the adopted rules describe the scope of benefits under the program. Therefore, DSHS does not believe the suggested revision is necessary.

§39.32. Non-entitlement and availability.

DSHS received no comments on this section.

§39.33. Definitions.

(1) *"Affiliate"*

Comment: A commenter suggested generally that the notice is insufficient because it does not identify the factual basis for the limits on affiliates and then, in light of the factual basis, clearly and logically demonstrate that the rule is a reasonable means of achieving a legitimate end.

Response: DSHS disagrees with this comment. Barring providers that affiliate with entities that perform or promote elective abortions from claiming reimbursement from state funds for services provided through the TWHP is a legitimate end. The United States Supreme Court has recognized that a state may adopt public policies that favor childbirth and disfavor abortion and may allocate public funds accordingly. *See Maher v. Roe,* 432 U.S. 464, 474 (1977). Our Legislature repeatedly has expressed a very strong interest in barring from a women's health program any provider that performs or promotes elective abortions or affiliates with an entity that performs or promotes elective abortions. A state agency cannot question the factual basis on which the Texas Legislature based this prohibition. Neither is the agency required under the Administrative Procedure Act to describe the factual basis underlying the legislative act.

Rather, the agency must describe the factual basis underlying its action. The preamble to the proposed rules and this preamble amply describe the factual and legal basis for the TWHP rules.

Comment: More specifically, a commenter proposed revising the definition of the term "affiliate" in §39.33(1)(B) to avoid a construction that the commenter feels would prevent a physician from participating if another physician in the medical group performs or promotes elective abortions, as well as a physician who is affiliated with a medical school or hospital. The commenter makes four suggestions that it believes will resolve the issue. First, the commenter suggests limiting the list of written instruments that govern an impermissible affiliation to those documents expressly listed, by changing "may include" to "are limited to." Second, in the alternative, the commenter suggests adding language at the end of subparagraph (B) that would expressly exclude an employment agreement. Third, the commenter suggests adding to the definition of "affiliate" a new subparagraph (C) that would state that a physician who is a member of a group practice is not considered an affiliate solely because another physician in the group practice performs or promotes elective abortions. And fourth, the commenter suggests a new subparagraph (D) that would state that a professor at a medical school is not considered an affiliate of the medical school or resident training program at which the professor teaches or provides instruction.

Response: DSHS will respond to the four suggestions in order. First, with respect, DSHS declines to revise the rule to specifically limit the list of written instruments that demonstrate an affiliation. The term "includes" is a term of enlargement, as the commenter recognizes, and its use provides DSHS with a permissible degree of flexibility in examining relationships to determine affiliations. Tex. Gov't Code §311.005(13). On the other hand, the types of instruments that may be used to demonstrate an affiliate relationship do not constitute an unlimited class. Under the canon of construction known as "ejusdem generis," an enumeration of specific items that follows a general term limits unlisted items to items similar in nature. Tex. Att'y Gen. Op. No. JC-410 (2001). In this instance, DSHS believes that the rule's specific list limits the type of instruments that will be considered evidence to those that evidence a legal relationship, usually between corporate entities, characterized by a degree of common control.

DSHS believes that organizations and entities that share common ownership, control, or identification (names, logos, etc.) are also very likely to share the same purpose, goals, or mission and to support--financially or physically, directly or indirectly--the communication of the same message. Thus, DSHS believes that when the Legislature specifically directed HHSC to disqualify affiliates of entities that perform or promote abortions from the Medicaid Women's Health Program, it intended HHSC (and now DSHS) to ensure that funds expended to provide services to women under the Medicaid Women's Health Program or the TWHP as its successor do not directly or indirectly support legislatively disfavored abortion services or the communication of support for such services.

DSHS believes this is so even if such support occurs through organizations that facially appear to be independent, but exhibit objective evidence of more than a simple arm's length relationship. Indeed, DSHS believes that the risks of directly or indirectly supplying support to disfavored activities is greatest when one organization has the ability directly or indirectly to control, order, or significantly influence the policies and actions of the other. Thus, DSHS believes that the most reliable means of ensuring implementation of legislative intent is to focus on legal relationships that confirm or infer such power. And the agency believes that the best evidence of such power are the instruments that govern the legal relationship between the parties.

Similarly, DSHS believes that the Legislature intended, through the administration of these programs and the expenditure of funds through these programs, to ensure that the State's overarching message to disfavor such services is confirmed as much as possible. DSHS believes that an entity cannot simultaneously participate in a program whose purpose is to confirm the State's general disapproval of abortion procedures and convey active support for such procedures, such as through advocacy or popularization of elective abortion (see discussion of §39.38(b) which follows after §39.37). And again, the agency believes the best evidence of this risk are the written instruments that legally govern the relationship between the parties.

The indicia of affiliation described in the proposed rule are patterned, in large part, after criteria commonly employed by state and federal administrative agencies to determine eligibility for specific regulatory treatment, to regulate program integrity, or to guard against fraud and self-dealing. *See, e.g.,* 47 U.S.C. §153(2) (defining "affiliate" for purposes of federal regulation of telecommunications to mean, *inter alia,* "a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person"); 13 C.F.R. §121.103 (for purposes of determining eligibility of a business for small business treatment by the U.S. Small Business Administration, "[c]oncerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists"); 42. C.F.R. §421.404 (for purposes of determining a Medicare Administrative Contractor's ability to enroll and process claims for related providers or suppliers, common control exists when an individual, group of individuals, or an organization has the power, directly or indirectly, to significantly influence or direct the actions or policies of a group of suppliers or providers); 28 TAC §7.202(a)(2) ("affiliate" means "affiliate of, or person affiliated with, a specific person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified"). These regulations are aimed at piercing the common practice of establishing separate legal entities to avoid regulation or sanction.

DSHS believes that the Legislature determined that organizations and entities that share common controls and purposes with an entity that performs or promotes elective abortion should be deemed unqualified to participate in the TWHP. DSHS believes that focusing on these relationships is a reasonable means of ensuring the TWHP's integrity and achievement of legislative intent.

With these principles in mind, the agency can now address the other recommended changes to the definition of "affiliate."

Regarding the second recommended change, DSHS declines to revise subparagraph (B) to insert at the end "but do not include an employment agreement." DSHS believes that employment contracts--at least as between an entity that performs or promotes abortion services and its employees--is objective evidence of common control that disqualifies the provider from participation in TWHP. The employment contract reasonably can be assumed to empower the employer to regulate or direct the ac-

tions of the employee. An organization that performs or promotes elective abortions can reasonably be assumed to have the authority to direct its employees to assist or implement these actions.

The same reasoning, however, cannot be applied to individuals who have relationships with organizations that do not exhibit evidence of common ownership, control, or identity with an entity that performs or promotes elective abortions. In DSHS' view, the Legislature did not intend to impute one individual's disfavored conduct to an entire group who (1) are associated only by virtue of each member's common ownership of employment with an entity whose mission differs from that of an abortion performing or promoting entity; and (2) have little control over other members' practices.

Accordingly, DSHS believes it is reasonable to modify the proposed rules to assure that documentation of the relationship between a physician and a physician group is not considered evidence of a disqualifying affiliation. DSHS amends subparagraph (B) to exclude agreements related to a physician's participation in a physician group practice. This change ensures that physicians who engage in disfavored activities (either for pay or on a voluntary basis) are not admitted to the TWHP, but their peers who do not engage in those activities are not disqualified by virtue of their common ownership interest in or employment by a physician group. Excepting physicians in group practices that do not conduct disfavored activities from the definition of "affiliate" is, in our view, narrowly tailored and consistent with the legislative intent, yet allows a sufficient number of providers to qualify to provide TWHP services.

As adopted, subparagraph (B) reads as follows:

§39.33(1)(B) - The written instruments referenced in subparagraph (A) of this paragraph may include a certificate of formation, a franchise agreement, standards of affiliation, bylaws, or a license, but do not include agreements related to a physician's participation in a physician group practice, such as a hospital group agreement, staffing agreement, management agreement, or collaborative practice agreement.

Fourth, DSHS declines to add a new subparagraph that would except from the definition of "affiliate" a professor at a medical school. A professor at a medical school will be considered unqualified to participate in TWHP if the professor performs or promotes elective abortions or is an affiliate of an entity that performs or promotes elective abortions. And in the absence of evidence of common ownership, control, or identity with an elective abortion provider, members of the faculty of a medical school who do not perform or promote elective abortions will not be disqualified to participate as a TWHP provider.

§39.33(8) Elective abortion.

Comment: A commenter suggested that the definition of the term "elective abortion" be revised to reflect the medical emergency exception that Health and Safety Code §285.202 sets out. As proposed, the definition excepts an abortion performed to terminate a pregnancy that resulted from rape or incest or an abortion performed to avert a threat to the mother's life. The commenter's suggested definition would expand to also include the termination of a pregnancy in two circumstances: (1) where continued pregnancy places the mother at risk of substantial impairment of a major bodily function; and (2) where the fetus has a severe fetal abnormality.

Response: Health and Safety Code §285.202 applies to hospitals districts and prohibits the transfer of state funds to a hospital district that uses tax revenue to finance the performance of an abortion. The statute excepts financing of abortions performed due to a medical emergency as defined in the statute. The language proposed by the commenter is derived from this definition.

Health and Safety Code §285.202 was added by Senate Bill 7 of the first called session of the 82nd Legislature, the same bill that enacted Human Resources Code §32.024(c-1). Thus, DSHS believes that the Legislature intended both provisions to be read in harmony and did not intend for a hospital that receives payment from a hospital district for the performance of an emergency abortion as defined in Health and Safety Code §285.202 to be disqualified under Human Resources Code §32.024(c-1). Accordingly, DSHS will revise the definition of "elective abortion" as the commenter suggests.

As revised, the definition will provide as follows:

§39.33(8) Elective abortion--The intentional termination of a pregnancy by an attending physician who knows that the female is pregnant, using any means that is reasonably likely to cause the death of the fetus. The term does not include the use of any such means:

(A) to terminate a pregnancy that resulted from an act of rape or incest;

(B) in a case in which a woman suffers from a physical disorder, physical disability, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy, that would, as certified by a physician, place the woman in danger of death or risk of substantial impairment of a major bodily function unless an abortion is performed; or

(C) in a case in which a fetus has a severe fetal abnormality, meaning a life-threatening physical condition that, in reasonable medical judgment, regardless of the provision of life-saving treatment, is incompatible with life outside the womb.

§39.34. Client Eligibility.

DSHS received no comments on this section.

§39.35. Application Procedures.

Comment: A commenter suggested that proposed paragraph (1) of subsection (a) be revised to delete a reference to a paper application and to add a new subparagraph (D) that would allow DSHS or its designee to approve other ways for women to obtain TWHP applications.

Response: DSHS will make these changes because they will provide DSHS with flexibility to adopt new ways for individuals to obtain TWHP applications, making it easier for potential participants to apply for services.

Comment: A commenter suggested that subsection (e) be modified to allow DSHS or its designee to request social security numbers from an applicant's budget group members.

Response: Section 39.35(e) as proposed authorizes DSHS or its designee to request, but not require, an applicant's budget group members' social security numbers. DSHS declines to amend the rule at this time as the commenter suggests but will monitor the situation and may amend the rule at a later date.

§39.36. Financial Eligibility Requirements.

DSHS received no comments on this section.

§39.37. Denial, Suspension, or Termination of Services; Client Appeals.

DSHS received no comments on this section.

§39.38 Health-Care Providers.

Comment: A commenter stated that the Preamble is insufficient because it fails to mention that the proposed provider qualifications violate both the federal and state constitutions.

Response: The rules have been formulated to comply with the federal and state constitutions, using in particular the guidance of the United States Supreme Court as set out in *Rust v. Sullivan. See Rust v. Sullivan,* 500 U.S. 173 (1991). Particularly, the rules attempt to place reasonable controls on the use of TWHP to convey legislatively disfavored messages and to promote as much as possible the legislative policy favoring childbirth.

Comment: A commenter suggested that DSHS lacks authority to limit the pool of providers that may participate in the TWHP, citing Human Resources Code §§32.001, 32.002, and 32.024(c-1), as well as Health and Safety Code §32.005.

Response: Human Resources Code Chapter 32, cited by the commenter, pertains to the operation of the Medicaid program by the HHSC. *See* Tex. Hum. Res. Code §32.001. Nothing in Human Resources Code Chapter 32--save for §32.024(c-1), which applies to any program that is the successor to the Medicaid Women's Health Program--applies to DSHS' authority to administer a non-Medicaid program.

Health and Safety Code §32.005 prohibits DSHS, in the operation of a maternal and infant health improvement services program, from applying funds under that program to pay for any abortion unless the life of the mother is in danger. Because TWHP will not be administered within the maternal and infant health improvement services program, Health and Safety Code §32.005 does not apply to the provision of services through the primary health care services program administered under Health and Safety Code Chapter 31.

The commenter seems to argue, however, that no other statutes provide DSHS with relevant authority to adopt rules with respect to TWHP. DSHS disagrees with the commenter's argument: Health and Safety Code §31.003 and §31.004 give DSHS broad authority to adopt rules for administering a primary health services program, including authority to adopt rules setting out the type of services to provided, the administrative structure, and the designation of public and private providers. This express authority encompasses authority to prescribe the qualifications of providers that participate in the TWHP.

Comment: The commenter also suggested that limiting the provider pool is inconsistent with DSHS' authority to administer family planning programs under Strategy B.1.3 of the General Appropriations Act. *See* General Appropriations Act, 82nd Leg., R.S., ch. 1355, art. II, Strategy B.1.3, at II-45 (Health and Human Services section, DSHS).

Response: As noted previously, DSHS' authority to administer the TWHP is not derivative of the authority to administer programs under Strategy B.1.3 because the TWHP is established under different authority and because funds for the TWHP were not appropriated under Strategy B.1.3.

Comment: A commenter also stated that the Preamble is insufficient because, in the commenter's view, it fails to note that the provider qualifications set forth in the TWHP rule will cause the number of providers that participate in the TWHP to be smaller than the number of providers that participate in the Medicaid Women's Health Program. According to the commenter, this will compound the loss of providers in the DSHS family planning programs and will make the recruiting of new participating providers challenging.

Response: DSHS appreciates the comment, but believes that the Administrative Procedure Act does not require the kind of comparative analysis the commenter suggests. DSHS agrees that access to services must take priority. To the extent that access becomes a problem, DSHS will work to recruit additional new qualified providers to the program.

Comment: A commenter indicated that the Preamble is insufficient because it does not describe how the provider qualifications listed in §39.38(b)(1) differ from the provider qualifications that apply to the current Medicaid Women's Health Program.

Response: The two programs are separate. Nothing in the Administrative Procedure Act requires a Preamble or an order adopting a rule to compare a new program to an old one.

Comment: A commenter stated that the Preamble is insufficient because it fails to acknowledge the burdens §39.38 will impose on TWHP providers.

Response: In the agency's view, such an acknowledgement would exceed the requirements of the Administrative Procedure Act. However, the burdens imposed by the TWHP are no greater than the burdens borne by providers currently enrolled in the Medicaid program.

Comment: A commenter stated generally that the prohibition on the promotion of elective abortions in §39.38, together with the prohibition on affiliation with entities that perform or promote elective abortion and the definition of "affiliate" in §39.33(1), contravenes the first and fourteenth amendments to the United States Constitution and the decision of the United States Court of Appeals, Fifth Circuit, in *Planned Parenthood v. Sanchez, See Planned Parenthood v. Sanchez,* 403 F.3d 324 (5th Cir. 2005).

Response: With respect, DSHS does not believe that the rules contravene these constitutional provisions. Under the United States Supreme Court's decision in *Rust,* the state has clear authority to regulate the conduct of a provider when the provider is performing services paid with public funds. *See Rust,* 500 U.S. at 196 - 197. Nor does DSHS believe that *Sanchez* applies to an analysis of these rules. The Texas Attorney General has opined expressly that the decision in *Sanchez* does not apply outside the context of Title X of the federal Public Health Services Act. Tex. Att'y Gen. Op. No. GA-0844 (2011). Consequently, DSHS believes it need not state a "legitimate objective" for adopting standards stricter than those set forth in *Sanchez.*

Comment: The same commenter indicated that it has gone to considerable expense to comply with the standards articulated in *Sanchez* and that the imposition of stricter standards constitute a taking of property and do not serve a legitimate objective.

Response: This argument presumes that the commenter is entitled to participate as a TWHP provider. Whether an entity has a property interest in a particular situation is a matter of state law. *See Personal Care Products, Inc. v. Hawkins,* 2009 WL 2406253, *7 (W.D. Tex. 2009). Even in the Medicaid context, a court has recognized that, depending on the terms of a particular state's Medicaid statutes, a provider may have no property interest in or entitlement to participation as a Medicaid provider. *See Kelly Kare, Ltd. v. O'Rourke,* 930 F2d 170, 176 (2d Cir.),

cert. Denied, 502 U.S. 907 (1991) (stating that a home-health provider has no property interest in continuing provider status under Medicaid); *Shankar v. Bonta,* 50 Fed. Appx. 840, 841 (9th Cir. 2002) (finding that a physician had no constitutionally protected property interest in enrolling as a Medi-Cal provider). The commenter fails to cite any state law that would create a property interest in providing purely state-funded services such as TWHP services, and DSHS is not aware of any such statute. And, as §39.32(a) of the rules indicates, TWHP does not create an entitlement program. Consequently, in our view, the rules do not impinge upon any protected property interests.

Comment: Commenters asserted that §39.38, together with the rules' definitions, will restrict a TWHP provider's conduct even outside TWHP.

Response: DSHS views these rules principally as setting out the standards a provider must meet to be qualified to perform services in TWHP. The Legislature has specifically stated that, because this State places a priority on life, a provider that performs or promotes elective abortions is unqualified to participate as a provider in a successor program to the Medicaid Women's Health Program. Likewise, a provider that is affiliated with an entity that performs or promotes elective abortions is unqualified to provide services for TWHP. A health-care provider is free to perform or promote elective abortions or to affiliate with an entity that performs or promotes elective abortions, but that provider must know that that conduct renders it unqualified to participate in THWP.

In addition, no TWHP provider may promote elective abortions by having available for TWHP clients any materials promoting elective abortions. In the State's view, the Legislature intended for any successor program to the Medicaid Women's Health Program to forbid any type of message regarding elective abortions that may be accessible to or received by TWHP clients. DSHS believes that controlling the messages accessible to TWHP clients is consistent with the United States Supreme Court's conclusions in *Rust,* even if that has an impact on the material the provider has lying about the office for non-TWHP patients. *See Rust,* 500 U.S. 173, 198 (1991) (approving governmental regulation requiring separation between abortion-related activities and publicly funded program); *Planned Parenthood Ass'n v. Suehs,* No. 12-50377, slip op. (5th Cir. Aug. 21, 2012) (approving state regulation restricting the content of the Medicaid Women's Health Program).

Comment: A commenter suggested that the provider qualifications will negatively impact a TWHP client's ability to receive services from the provider of her choice.

Response: Nothing in the rules guarantees that a TWHP client may select from an unlimited universe of providers. Rather, a provider must be qualified, as the State defines "qualified," and must be willing to provide services through TWHP. Analogously, even in Medicaid, a client's choice is not unbridled. Under §1902(a)(23) of the Social Security Act, a client may choose from only those providers that are "qualified" and who "undertake to provide" Medicaid services. *See O'Bannon v. Town Court Nursing Ctr.,* 447 U.S. 773, 785 (1980).

Comment: A commenter proposed amending §39.38(b) by deleting paragraph (1), which requires a TWHP provider to ensure that the provider does not perform or promote elective abortions outside the scope of TWHP and is not an affiliate of an entity that does so. The commenter suggests, in the alternative, deleting the phrases "or promote" and "and is not an affiliate of an entity that performs or promotes elective abortions." In the commenter's view, what a TWHP provider does outside the scope of TWHP is irrelevant to the program. However, according to the commenter, the alternative would allow the state to exclude providers that perform elective abortions but not exclude entire group practices solely because some members of the group practice perform elective abortions. Further, the alternative would avoid what the commenter believes are violations of the First Amendment to the United States Constitution.

Response: DSHS respectfully declines either to delete §39.38(b)(1) or to revise it as suggested by the commenter. DSHS disagrees that a provider's conduct outside the TWHP is "irrelevant" to the provider's qualification to participate in the TWHP. The Texas Legislature repeatedly has directed that a health-care provider that performs or promotes elective abortions is unqualified to participate in a program that provides family-planning services to women as a successor to the Medicaid Women's Health Program. The state may not disregard the Legislature's directive unless a court finds the directive to be unconstitutional. No court has held that a state's determination that entities that perform elective abortions are unqualified to provide publicly funded family planning services is unconstitutional, and, in our view, determining provider qualifications for a state-funded program is within the state's authority. Indeed, the Fifth Circuit's ruling in *Planned Parenthood v. Suehs* holds that the Constitution permits the State to exclude abortion-promoting entities from the Medicaid Women's Health Program.

Comment: The commenter also suggested revising paragraph (2) of §39.38(b) by deleting subparagraph (A), which relates to the promotion of elective abortion within the scope of TWHP. The commenter indicates that this subparagraph, if left in, would be inconsistent with a physician's obligation to provide a patient with medically appropriate information. Additionally, the commenter avers, a physician may be subject to liability for medical malpractice and to discipline by the state licensing board from violating principles of medical ethics.

Response: DSHS does not agree that the proposed rules imposed constraints on physician-patient communications that differ markedly from other publicly funded family planning programs. *See, e.g.,* 42 C.F.R. 59.5 (for family planning services funded pursuant to Title X of the Social Security Act, a family planning provider must provide information concerning specified options, including termination of a pregnancy upon a patient's request "except with respect to any option(s) about which the pregnant woman indicates she does not wish to receive such information and counseling"). Such restrictions presumably apply even if the physician believes information and counseling that the patient rejects is medically appropriate.

DSHS does recognize, however, that treatment of health care conditions is most effective when the provider and patient maintain a trusting relationship that facilitates candid discussion of the patient's health care needs and options. DSHS also believes that such discussions need not--and in the case of TWHP must not--slip into advocacy for illegal or (again in the case of TWHP) legislatively disfavored elective procedures. As discussed in this preamble, DSHS will amend the definition of "promote" (paragraph (1) of subsection (c) of this section) to facilitate and tailor the provision of factual information and nondirective counseling in a manner intended to fulfill legislative intent.

Comment: A commenter suggested that the separation requirements set out in §39.38(b)(2)(B), (C) surpass those agreed to under *Planned Parenthood v. Sanchez. See Planned Parent-*

hood v. Sanchez, 280 F. Supp. 2d 590 (W.D. Tex. 2003). The commenter further suggests that the Preamble is insufficient because it fails to justify the separation requirements.

Response: DSHS disagrees on both points. The Texas Attorney General has indicated that *Sanchez* applies only in the context of Title X of the Public Health Act. *See* Tex. Att'y Gen. Op. No. GA-0844 (2011). Consequently, its holding does not apply to these rules. Additionally, DSHS believes that the notice complies with the standards set out in the Administrative Procedure Act. See Tex. Gov't Code §2001.024(a). With respect to a program that succeeds the Medicaid Women's Health Program, Human Resources Code §32.024(c-1) prohibits contracts with any entity that performs or promotes elective abortions or that is an affiliate of such an entity. While an administrative agency may not adopt a rule that is inconsistent with the statutes the agency is authorized to effectuate, *see R.R. Comm'n of Tex. v. Lone Star Gas Co.,* 844 S.W.2d 679, 685 (Tex. 1992), the agency may adopt rules that reasonably define statutory terms or fill in details not specified by statute. *See* Tex. Att'y Gen. Op. Nos. GA-0845 (2012); GA-0708 (2009).

Comment: Another commenter suggested replacing the text of the proposed §39.38(b)(2)(B) with more specific requirements regarding the necessary physical and financial separation of TWHP providers and physicians or entities that perform or promote elective abortions. Among other things, the commenter suggests a requirement that all TWHP services be located at least 100 yards from the location of any elective abortion activities and that all employees, volunteers, and governing boards of a TWHP provider be totally separate from an entity that performs or promotes elective abortions. The commenter also suggests revisions empowering the Executive Commissioner of the HHSC to determine a TWHP provider's "objective integrity and independence" based upon factors such as the presence of accounting records that are separate from those of an entity that performs or promotes elective abortions; the degree of physical separation between facilities used to provide TWHP services and those used in connection with the performance or promotion of elective abortion; the existence of separate personnel; and the extent to which materials promoting abortion are available at the TWHP provider's location and on the TWHP provider's public electronic communications. The commenter describes the proposed revisions as necessary to adequately ensure that TWHP activities are truly separated from the performance and promotion of elective abortion.

Response: DSHS agrees that more specific standards would assist TWHP providers in knowing exactly the degree of separation that is required. More importantly, DSHS believes that the standards proposed by the commenter are consistent with the Legislature's intent that, in a successor program to the Medicaid Women's Health Program, no money be used to contract with an entity that performs or promotes elective abortions or that affiliates with an entity that performs or promotes elective abortions. DSHS will alter the commenter's proposal in two respects, however.

First, as submitted, the commenter's proposal would empower the HHSC Executive Commissioner to determine a TWHP provider's "objective integrity and independence." Because TWHP will be a DSHS program, the language will be changed to house the authority with DSHS or its designee. Second, DSHS believes that the initial requirement that TWHP services have an "objective integrity and independence from elective abortion and its promotion" would be clarified by adding a cross-reference to clause (ii).

As revised, §39.38(b)(2)(B) will require that a TWHP provider must ensure that, in offering or performing a TWHP service, the provider:

(B) maintains physical and financial separation between its TWHP activities and any elective abortion-performing or abortion-promoting activity, as evidenced by the following:

(i) physical separation of TWHP services from any elective abortion activities, no matter what entity is responsible for the activities;

(ii) a governing board or other body that controls the TWHP health care provider has no board members who are also members of the governing board of an entity that performs or promotes elective abortions;

(iii) accounting records that confirm that none of the funds used to pay for TWHP services directly or indirectly support the performance or promotion of elective abortions by an affiliate; and

(iv) display of signs and other media that identify TWHP and the absence of signs or materials promoting elective abortion in the provider's location or in the provider's public electronic communications; and....

Comment: A commenter stated generally that §39.38(b)(2)(C), which prohibits the use of any type of registered identification mark in the offering or performance of any TWHP service, deprives the commenter of its property in violation of the federal and state constitutions.

Response: DSHS disagrees with the commenter. The United States Court of Appeals for the Fifth Circuit recently has affirmed the State's authority to prohibit the expenditure of public funds for services provided by an organization that promotes abortion through identifying marks. *See Planned Parenthood v. Suehs,* No. 12-50377, slip op. (5th Cir. Aug. 21, 2012). According to the Court, "Texas's authority to directly regulate the content of its own program necessarily includes the power to limit the identifying marks that program grantees are authorized to use." *Id.*

Comment: A commenter suggested that a description in §38.39(c) of activities that "promote" elective abortion "interfere with" a TWHP provider's relationship with TWHP clients.

Response: With respect, DSHS believes that *Rust* provides sufficient authority for DSHS to regulate a TWHP provider's relationship with a TWHP client. *See Rust,* 500 U.S. at 198. Furthermore, as discussed below, subsection (c) is revised to accommodate the communication of neutral, factual information upon a TWHP client's request, provided such communication does not involve taking affirmative steps to secure abortion services for a TWHP client.

Comment: A commenter stated that the introductory heading "Defining 'promote'" is incorrect, because what follows is not a definition but a list of items included within the term "promote."

Response: DSHS agrees, but believes that the revised subsection (c) will remedy the problem.

Comment: A commenter stated that subsection (c) is unclear as to what is prohibited and what is permitted and that this lack of clarity makes comment on any possible constitutional implications impossible.

Response: Although DSHS does not find subsection (c) unclear, it will revise the lead-in sentence to read as follows:

(c) Defining "promote." For purposes of subsection (b) of this section, the term "promote" means advancing, furthering, advocating, or popularizing elective abortion, by, for example:....

Comment: A commenter suggested replacing the whole of subsection (c) with the definition of "promotes" used in the rules governing the current Medicaid Women's Health Program, so that it would read, "For purpose of this section, the term 'promotes' means advocates or popularizes by, for example, advertising or publicity." *Cf.* 1 TAC §354.1362(6).

Response: DSHS believes that the subsection (c), as revised, will resolve this issue.

Comment: With respect to the list of activities that constitute the promotion of elective abortion set out in §39.38(c), a commenter advocated the deletion of the phrase "but is not necessarily limited to" after the term "includes." The commenter believes the language is overly broad and provides insufficient guidance to physicians trying to determine whether particular activity constitutes the promotion of elective abortions.

Response: DSHS believes that the revision of subsection (c) resolves this issue by more clearly defining the scope of allowable and unallowable communication between a TWHP client and her provider. DSHS believes that, as revised, subsection (c) will reduce uncertainty about the limits of providers' communications and will facilitate greater participation by the provider community.

Comment: A commenter suggested deleting §39.38(c)(1), which includes within the scope of promotion the provision of client counseling concerning the use of abortion as a method of family planning or within the continuum of family planning services.

Response: DSHS agrees that the phrase is not appropriately included within the rules and, considering the revisions to paragraphs (1) and (2) of the subsection, is not necessary to include in the final rule.

As revised, §39.38(c)(1) will read as follows:

(1) taking affirmative action to secure elective abortion services for a TWHP client (such as making an appointment, obtaining consent for the elective abortion, arranging for transportation, negotiating a reduction in an elective abortion provider fee, or arranging or scheduling an elective abortion procedure); however, the term does not include providing upon the patient's request neutral, factual information and nondirective counseling, including the name, address, telephone number, and other relevant information about a family planning provider.

The proposed paragraph (2) of the subsection will be deleted, and the remaining paragraphs will be renumbered accordingly.

Comment: A commenter advocated replacing subsection (c)(1) of §39.38 with the following: "The term 'promotes' does not include confidential communications that occur between patients and physicians pursuant to an examination or treatment."

Response: DSHS believes that the revision of subsection (c)(1) and (2) will resolve this issue.

Comment: A commenter suggested modifying the phrase "TWHP client" in subsection (c)(1) - (3) with the adjective "current," to read "current TWHP client."

Response: DSHS believes inserting the adjective "current" is unnecessary. Once a TWHP client stops participating in TWHP, she is no longer a TWHP client, and a reference to a "TWHP client" would not apply to her. Similarly, referring to a woman who is receiving TWHP services as a "current TWHP client" is redundant.

Comment: A commenter suggested that DSHS insert before the term "abortion" in paragraphs (1) and (3) of subsection (c) the term "elective."

Response: DSHS agrees to add the term in paragraph (3), making the phrase "elective abortion." This will make use of the phrase consistent throughout the rules. In addition, Human Resources Code §32.024(c-1) is concerned solely with elective abortions, showing that the Legislature did not intend to impinge upon the performance or promotion on those abortions that are not elective.

Comment: A commenter suggested deleting from subsection (c)(1) and (2) the phrase "as a method of family planning or within the continuum of family planning services." In the commenter's view, this phrase undermines the intent of the rules, which the commenter otherwise favors. In the commenter's view, a TWHP provider "must refrain from promoting, referring, or recommending abortion to any client regardless of the context of the discussion, family planning or otherwise."

Response: DSHS believes that the revision of paragraphs (1) and (2) resolves this issue.

Comment: A commenter suggested deleting the acronym "TWHP" from subsection (c)(1) - (3) so that the phrase "TWHP client" would read "client."

Response: DSHS declines to delete "TWHP" as the adjective before "client." The United States Supreme Court indicated in *Rust* that a governmental entity could regulate the conduct of a provider of publicly funded health care services with respect to that program, but left open the extent to which the government may regulate the provider's conduct outside the program. *See Rust,* 500 U.S. at 198. It is therefore appropriate to impose some restrictions that apply only to a provider's conduct within the context of the TWHP program.

Comment: A commenter suggested that subsection (c)(1) be revised to insert the phrase "including nondirective counseling" after "providing to a TWHP client counseling."

Response: DSHS believes that the revision of paragraphs (1) and (2) of the subsection resolves this issue.

Comment: A commenter alleged that subsection (c)(4) of the proposed is unclear with respect to how it differs from the requirements governing the current Medicaid Women's Health Program. In particular, the commenter asks whether, if a provider completely removes from its signage, employee badges, paperwork, etc, any registered identification mark, it may be said to be "operating under" the identification mark.

Response: Subsection (c)(4) of the proposed rules appears as subsection (c)(3) in the final rule. DSHS does not find the phrase unclear. Furthermore, the definition of "affiliate" in §39.33 confirms that a provider is also disqualified by virtue of the legal relationship it maintains with an entity that performs or promotes elective abortion. Removing identifying marks or symbols does not negate that relationship. So, the provider could not affiliate with an entity that performs or promotes elective abortions, re-

gardless of the presence of visible or accessible identification marks or promotional materials.

Comment: A commenter suggested that subsections (b) and (c) of this section together, because they are (in the commenter's view) burdensome for providers, will reduce the number of providers who will participate in TWHP. Another commenter suggested that, because the number of providers will be reduced, TWHP clients may have significant problems finding transportation to the providers.

Response: DSHS respectfully disagrees with the comment. Analyses performed by HHSC, on behalf of DSHS, suggests that TWHP clients will have sufficient access to a qualified TWHP provider and that the distance to such a provider will not substantially differ. Additionally, DSHS or its designee will monitor access issues and will seek to recruit providers to participate in the program.

Comment: A commenter suggested adding a new subsection (d) to expressly except client counseling from the term "promote." As suggested, the new subsection would read: "(d) Client counseling excepted. Notwithstanding subsection (c) of this section, the term 'promote' does not include confidential communications that occur between patients and physicians pursuant to an examination or treatment."

Response: DSHS believes that the revision of paragraphs (1) and (2) of subsection (c) resolves this issue.

Comment: A commenter suggested that a new subsection be added to §39.38 to make clear that DSHS must comply with restrictions in Government Code §531.0025 as well as the restrictions in these rules. Government Code §531.0025 establishes priorities for "awards" of "money appropriated to" DSHS "for the purpose of providing family planning services."

Response: DSHS appreciates the comment but does not believe Government Code §531.0025 applies to the use of funds in TWHP. First, DSHS understands that in Government Code §531.0025, plain language to apply to funds directly appropriated to DSHS, and the allusion to family planning services suggests that the funds would be appropriated under what is numbered Strategy B.1.3 in the current General Appropriations Act. *See* General Appropriations Act, 82nd Leg., R.S., ch.1355, art. II, Strategy B.1.3, at II-45 ("Family Planning Services"). Section 531.0025 parallels rider 77 to the DSHS appropriation, which also applies to funds appropriated "in Strategy B.1.3, Family Planning Services." *See id.* rider 77, at II-71.

Second, the term "award" in Government Code §531.0025 is typically associated with the award of grants, which is how DSHS distributes the funds appropriated to it for family planning services under Strategy B.1.3. TWHP providers are not awarded contracts in the same sense, either legally or administratively. Rather, TWHP providers are enrolled to participate in the program, subject to satisfying any eligibility requirements applicable to the provider. *See* 1 TAC §391.103(1) (a health and human services agency may enlist or enroll service providers under a method that is open to all such providers who meet qualification criteria established by the purchasing agency).

Third, subsection (b) of Government Code §531.0025 requires DSHS to ensure that funds are distributed in accordance with federal law. But TWHP is a totally state-funded program, and federal law presumably does not apply.

In sum, because Government Code §531.0025 does not apply to TWHP, DSHS declines to make the suggested change.

Comment: A commenter suggested deleting subsection (d), which requires a TWHP provider to produce all information DSHS or its designee requests to determine whether the provider has complied with §39.38. In the alternative, the commenter suggests limiting a possible request to produce information to information obtained or maintained pursuant to TWHP within one calendar year before the request to produce; that the request to produce information be based on an allegation or evidence that the provider has violated §39.38; and guaranteeing the provider 45 days to comply with the request. The commenter feels that, as proposed, subsection (d) imposes onerous burdens on TWHP providers.

Response: DSHS declines to revise §39.38 either to delete subsection (d) or to add the language the commenter suggests as an alternative. The State must be able to audit a TWHP provider's compliance with program requirements, and either of the suggested changes would frustrate the State's ability to do so. In addition, with respect to the suggested 45-day period for a provider to produce requested information, DSHS is not aware of any legal requirement that would mandate such a policy.

§39.39. Covered Services.

Comment: A commenter suggested several services that the commenter believes should be added to the list of covered services: a follow-up visit after an abnormal Pap test; treatment of all sexually transmitted infections (STIs); mammography and diagnostic services for breast cancer; and referrals for diagnosis and treatment of any identified health conditions that require follow-up. The commenter believes these additional services would be consistent with DSHS' authority in the Primary Health Care Services Program under Health and Safety Code Chapter 31. *See* Health and Safety Code §31.003(e).

Response: Health and Safety Code Chapter 31 establishes initial services priorities for the Primary Health Care Services Program, diagnosis and treatment; emergency services; family planning services; preventive health services; health education; and laboratory, X-ray, nuclear medicine, or other appropriate diagnostic services. Even if Health and Safety Code Chapter 31 can be read to say that DSHS must, through its Primary Health Care Services Program, provide all of these services, it cannot be read to say that TWHP, a component of the larger Primary Health Care Services Program, must provide all of the services. Additionally, as a successor program to the Medicaid Women's Health Program, a primary goal of the TWHP is to allow women to space their pregnancies and thereby to improve their health and the health of their babies. Breast and cervical cancer screenings and STI testing and treatment are incidental benefits. Furthermore, adding to the list of covered services as suggested would incur substantial costs. HHSC does not have LBB approval to create additional program costs by adding any services other than the treatment of certain STIs.

Comment: Another commenter suggested revising paragraph (3) of §39.39 to exclude from the covered service of counseling on specific methods and use of contraceptives "drugs and devices whose primary method of birth control is to prevent implantation."

Response: DSHS declines to make this revision. The TWHP service array is based upon requirements outlined at Human Resources Code §32.0248 (expired). Although this section of the Code has expired, we believe the legislative directive to administer a successor program indicates that the service array should be substantially similar to that provided in the original Medicaid

Women's Health Program. More importantly, Human Resources Code §32.0248 expressly authorized the provision of contraceptives, "except for the provision of emergency contraceptives." Because the contraceptives the commenter describes are not considered emergency contraceptives, they were available under the Medicaid Women's Health Program. And we find no evidence of a legislative intent to exclude any type of contraceptive other than emergency contraceptives. *See* Tex. Att'y Gen. Op. No. JC-0183 (2000) (articulating the doctrine of statutory construction that the express mention of one thing is equivalent to the express exclusion of all other things).

§39.40. Non-covered Services.

Comment: Corresponding to the proposed additions to the list of covered services in §39.39, the same commenter suggested deleting the same services from the list of non-covered services. This would delete paragraphs (2), (5), and (6) in their entirety and revise paragraph (3).

Response: DSHS is not revising the covered services listed in §39.39, as explained previously. To maintain the agreement between §39.39 and §39.40, DSHS declines to revise §39.40 as the commenter suggests.

Comment: Another commenter suggested revising paragraph (7) to expressly include among the non-covered services counseling on and provision of "drugs and devices whose primary method of birth control is to prevent implantation."

Response: For the reasons cited in response to a similar comment on §39.39, DSHS declines to make this revision.

§39.41. Reimbursement.

Comment: A commenter suggested that subsection (a), which provides for reimbursing TWHP claims on a fee-for-service basis, be revised to permit the payment of claims through a reimbursement methodology "appropriate for the provider type, including prospective payment system reimbursement for federally qualified health centers" (FQHCs). The commenter points out that an FQHC is not paid on a fee-for-service basis and that a rule that limits reimbursement to that paid on a fee-for-service basis will impact FQHCs' participation.

Response: DSHS understands the commenter's concern. In the Medicaid Women's Health Program, a TWHP provider is paid on the basis of a prospective-payment system or an alternative-prospective-payment system. DSHS accordingly will revise subsection (a) to remove references to fee-for-service reimbursement and to instead refer more broadly to reimbursement under 1 TAC Chapter 355. Chapter 355 sets out methodologies for reimbursing Medicaid providers and includes methodologies for calculating fee-for-service reimbursement as well prospective-payment-system and alternative-prospective-system reimbursement paid to FQHCs.

As revised and adopted, subsection (a) will read:

(a) Reimbursement. Services provided through TWHP will be reimbursed in accordance with 1 TAC Chapter 355 (relating to Reimbursement Rates).

Comment: A commenter suggested that subsection (c), which prohibits a TWHP provider from using any funds received as reimbursement for services provided through the TWHP to pay the direct or indirect costs (including overhead, rent, phones, equipment, and utilities) of elective abortions, is contrary to Rider 17 to the DSHS portion of article II of the current General Appropriations Act. General Appropriations Act, 82nd Leg., R.S., ch. 1355, art. II, rider 17, at II-57 (Health and Human Services section, DSHS). Rider 17(a) expresses the Legislature's intent that DSHS use no funds to pay "the direct or indirect costs (including overhead, rent, phones[,] and utilities) of abortion procedures performed by" DSHS contractors. *Id.* rider 17(a). Rider 17(b) further expresses the Legislature's intent to prohibit DSHS from distributing any funds appropriated under Strategy B.1.3 to an individual or entity that performs elective abortion procedures or that contracts with or funds an individual or entity "for the performance of elective abortion procedures." *Id.* rider 17(b). The commenter specifically argues, first, that Rider 52 to the DSHS portion of article II, not Rider 17, applies; second, that family planning contractors that contract with DSHS to provide services under Strategy B.1.3 of the General Appropriations Act do not perform abortions; and third, that Rider 17 does not speak in terms of "promoting abortion."

Response: DSHS believes that §39.41(c) is consistent with and effectuates Rider 17(a), which expresses the Legislature's intent that "no funds be sued to pay the direct or indirect costs (including overhead, rent, phones and utilities) of abortion procedures provided by" DSHS contractors. By its terms, Rider 17(a) is not limited in scope to funds appropriated under Strategy B.1.3. By contrast, Rider 52 applies expressly to funds distributed under Strategy B.1.3. *See* General Appropriations Act, 82d Leg., R.S. ch. 1355, art. II, rider 52, at II-64 (Health and Human Services section, DSHS). Thus, Rider 52 does not apply to funds distributed through TWHP, but Rider 17(a) does apply to TWHP funds. Rider 17(b) does not apply to the TWHP because it applies expressly to funds appropriated under Strategy B.1.3, and TWHP is not funded under that strategy. In addition, although Rider 17(a) does not use the term "promote," it prohibits the use of funds to pay "indirect costs" of abortion procedures performed by contractors. The term "indirect" is undefined, and the parenthetical provides an inclusive, not an exclusive, list of indirect costs. *See* Tex. Gov't Code §311.005(13) (defining the word "includes" as a term of "enlargement" that does not denote an "exclusive enumeration"). DSHS believes the costs of promotion are indirect costs related to the performance of elective abortions.

Comment: A commenter asked that subsection (c) be deleted because it is, in the commenter's view, overly broad, burdensome, and an invasion of physician privacy.

Response: DSHS declines to delete subsection (c). As explained above, DSHS believes subsection (c) is consistent with the expression of legislative intent in Rider 17.

Comment: In the alternative, the same commenter asks that, if DSHS elects to keep subsection (c), references to indirect costs and the inclusive parenthetical be deleted. The commenter believes the term "indirect" is overly broad and could encompass a physician's donation or to a teaching institution or charity that performs or promotes abortions.

Response: Again, DSHS declines to modify subsection (c) because it effectuates Rider 17.

§39.42. Provider's Request for Review of Claim Denial.

DSHS received no comments on this section.

§39.43. Confidentiality.

DSHS received no comments on this section.

§39.44. Audits; Reports.

Comment: A commenter suggested that subsection (b) be deleted. This subsection requires a TWHP provider to produce all information DSHS or its designee requests to determine whether the provider has complied with §39.38. In the alternative, the commenter suggests limiting a possible request to produce information to information obtained or maintained pursuant to TWHP within one calendar year before the request to produce; that the request to produce information be based on an allegation or evidence that the provider has violated §39.38; and guaranteeing the provider 45 days to comply with the request. The commenter's reasoning mirrored that of a similar comment to §39.38(d).

Response: DSHS declines to revise §39.44 either to delete subsection (b) or to add the language the commenter suggests as an alternative. Either change would frustrate the State's ability to audit compliance with the regulatory requirements. In addition, with respect to the suggested 45-day period for a provider to produce requested information, DSHS is not aware of any legal requirement that would mandate such a policy.

§39.45. Severability.

Comment: A commenter suggested that the severability provision be amended to clarify which rules are severable, rather than leave the decision within DSHS' discretion.

Response: DSHS agrees that clarification would aid in the implementation and enforcement of the rules and will ensure the TWHP program is operated strictly in accordance with legislative intent. Specifically, DSHS believes that the rule must be clarified to assure that the program cannot be employed to fund providers that the Legislature expressly found to be unqualified to participate. Accordingly, DSHS will amend §39.45 to read as follows:

(a) The Texas Legislature, in enacting Human Resources Code, §32.024(c-1), confirmed its intent that the Texas Women's Health Program, as successor to the Medicaid Women's Health Program, must be operated only in a manner that ensures:

(1) that no funds spent under the program are spent to perform or promote elective abortions; and

(2) compliance with the conditions specified in former Human Resources Code, §32.0248, which prohibited contracts with entities that perform or promote elective abortions and affiliates of such entities.

(b) DSHS, as the agency responsible for administering the TWHP, is subject to the conditions specified in Human Resources Code, §32.024(c-1). Its authority to operate the program is thus strictly limited, and DSHS has no authority to operate the TWHP except in compliance with such conditions.

(c) Section 39.33(1) of this title (relating to Definitions) and §39.38 of this title (relating to Health Care Providers) are necessary and integral to the implementation of the requirements of Human Resources Code, §32.024(c-1), the fulfillment of legislative intent, and the achievement of the objectives of the TWHP. As such, DSHS regards the provisions and application of these sections as essential aspects of DSHS's compliance with state law and, therefore, not severable from the other provisions of this subchapter.

(d) Accordingly, to the extent that §39.33(1), §39.38, or this section is determined by a court of competent jurisdiction to be unconstitutional or unenforceable, or to the degree an official or employee of DSHS, HHSC, or the State of Texas is enjoined from enforcing these sections, DSHS shall regard this entire subchapter as invalid and unenforceable and shall cease operation of the program.

(e) To the extent that any part of this subchapter other than §39.33(1), §39.38, or this section are enjoined, DSHS or its designee may enforce the parts of the subchapter not affected by such injunctive relief to the extent that DSHS or its designee determines it can do so consistently with the legislative intent and the objectives of this subchapter.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five fiscal years this rule will be in effect, there will be a fiscal impact to state government as a result of enforcing or administering the sections as proposed. The effect on state government is an estimated cost to general revenue of $36,281,185 for state fiscal year (SFY) 2013; $43,160,381 for SFY 2014; $44,602,380 for SFY 2015; $46,090,348 for SFY 2016; and $47,649,725 for SFY 2017.

The proposed new rules will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs as a result of enforcing or administering the sections as proposed.

Public Benefit

HHSC has determined that for each of the five years these new rules are in effect, the public will benefit from the adoption of these rules. The anticipated public benefit of adopting the proposed new rules will be continued access to essential women's health services. In addition, maintaining a state-funded Women's Health Program would generate cost avoidance in the Medicaid program, resulting in a projected savings to general revenue of $0 for SFY 2013; ($46,857,177) for SFY 2014; ($47,888,035) for SFY 2015; ($48,941,572) for SFY 2016; and ($49,736,854) for SFY 2017.

Legal Certification

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

Statutory Authority

The new sections are authorized generally by Health and Safety Code §12.001 and §1001.071, and more specifically by Health and Safety Code §§31.002(a)(4)(C) and (H), 31.003, and 31.004, under which DSHS may establish a program providing primary health care services, including family planning services and health screenings, and to adopt rules governing the type of services to be provided, the eligibility of recipients, and administration of the program. In addition, Government Code §531.0055 authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules for the operation and provision of health and human services by the health and human services agencies.

§39.33. Definitions.

The following terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise.

(1) Affiliate--

(A) An individual or entity that has a legal relationship with another entity, which relationship is created or governed by at least one written instrument that demonstrates:

(i) common ownership, management, or control;

(ii) a franchise; or

(iii) the granting or extension of a license or other agreement that authorizes the affiliate to use the other entity's brand name, trademark, service mark, or other registered identification mark.

(B) The written instruments referenced in subparagraph (A) of this paragraph may include a certificate of formation, a franchise agreement, standards of affiliation, bylaws, or a license, but do not include agreements related to a physician's participation in a physician group practice, such as a hospital group agreement, staffing agreement, management agreement, or collaborative practice agreement.

(2) Applicant--A woman applying to receive services under TWHP, including a current recipient who is applying to renew.

(3) Budget group--Members of a household whose needs, income, resources, and expenses are considered in determining eligibility.

(4) Client--A woman who receives services through TWHP.

(5) Corporate entity--A foreign or domestic non-natural person, including a for-profit or nonprofit corporation, a partnership, and a sole proprietorship.

(6) Covered service--A medical procedure for which TWHP will reimburse an enrolled health-care provider, as listed in §39.39 of this title (relating to Covered Services).

(7) DSHS--The Department of State Health Services.

(8) Elective abortion--The intentional termination of a pregnancy by an attending physician who knows that the female is pregnant, using any means that is reasonably likely to cause the death of the fetus. The term does not include the use of any such means:

(A) to terminate a pregnancy that resulted from an act of rape or incest;

(B) in a case in which a woman suffers from a physical disorder, physical disability, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy, that would, as certified by a physician, place the woman in danger of death or risk of substantial impairment of a major bodily function unless an abortion is performed; or

(C) in a case in which a fetus has a severe fetal abnormality, meaning a life-threatening physical condition that, in reasonable medical judgment, regardless of the provision of life-saving treatment, is incompatible with life outside the womb.

(9) Family planning services--Educational or comprehensive medical activities that enable individuals to determine freely the number and spacing of their children and to select the means by which this may be achieved.

(10) Health-care provider--A physician, physician assistant, nurse practitioner, clinical nurse specialist, certified nurse midwife, federally qualified health center, family planning agency, health clinic, ambulatory surgical center, hospital ambulatory surgical center, laboratory, or rural health center.

(11) Health clinic--A corporate entity that provides comprehensive preventive and primary health care services to outpatient clients, which must include both family planning services and diagnosis and treatment of both acute and chronic illnesses and conditions in three or more organ systems. The term does not include a clinic specializing in family planning services.

(12) TWHP--Texas Women's Health Program.

(13) TWHP provider--A health-care provider that performs covered services.

§39.35. Application Procedures.

(a) Application. A woman, or an individual acting on the woman's behalf, may apply for TWHP services by completing an application form and providing documentation as required by DSHS or its designee.

(1) An applicant may obtain an application in the following ways:

(A) from a local benefits office of the Health and Human Services Commission, a TWHP provider's office, or any other location that makes TWHP applications available;

(B) from the TWHP website;

(C) by calling 2-1-1; or

(D) by any other means approved by DSHS or its designee.

(2) DSHS or its designee accepts and processes every application received through the following means:

(A) in person at a local benefits office of the Health and Human Services Commission;

(B) by fax; or

(C) through the mail.

(b) Processing timeline. DSHS or its designee processes a TWHP application by the 45th day after the date DSHS or its designee receives the application.

(c) Start of coverage. Program coverage begins on the first day of the month in which DSHS or its designee receives a valid application. A valid application has, at a minimum, the applicant's name, address, and signature.

(d) Exclusive application. The TWHP application form may not be used to apply for any other programs.

(e) Social security number (SSN) required. In accordance with 42 U.S.C. §405(c)(2)(C)(i), DSHS or its designee requires an applicant to provide or apply for a social security number. DSHS or its designee requests, but does not require, budget group members who are not applying for TWHP to provide or apply for an SSN.

(f) Face-to-face interviews. In general, DSHS or its designee does not require an applicant to attend a face-to-face interview unless DSHS or its designee has received conflicting information related to the household membership or income that affects eligibility. An applicant may, however, request a face-to-face or telephone interview for an initial or a renewal application.

(g) Identity. An applicant must verify her identity the first time she applies to receive covered services.

(h) Citizenship. If an applicant is a citizen, she must provide proof of citizenship. If the applicant, who is otherwise eligible to receive TWHP services, is not a citizen, DSHS or its designee determines her eligibility in accordance with 1 TAC §366.513 (relating to Citizenship).

§39.38. Health-Care Providers.

(a) Procedures. A TWHP provider must comply with the requirements set out in 1 TAC Chapter 354, Subchapter A, Division 1 (relating to Medicaid Procedures for Providers).

(b) Qualifications. A TWHP provider must ensure that:

(1) the provider does not perform or promote elective abortions outside the scope of the TWHP and is not an affiliate of an entity that performs or promotes elective abortions; and

(2) in offering or performing a TWHP service, the provider:

(A) does not promote elective abortion within the scope of the TWHP;

(B) maintains physical and financial separation between its TWHP activities and any elective abortion-performing or abortion-promoting activity, as evidenced by the following:

(i) physical separation of TWHP services from any elective abortion activities, no matter what entity is responsible for the activities;

(ii) a governing board or other body that controls the TWHP health care provider has no board members who are also members of the governing board of an entity that performs or promotes elective abortions;

(iii) accounting records that confirm that none of the funds used to pay for TWHP services directly or indirectly support the performance or promotion of elective abortions by an affiliate; and

(iv) display of signs and other media that identify TWHP and the absence of signs or materials promoting elective abortion in the provider's location or in the provider's public electronic communications; and

(C) does not use, display, or operate under a brand name, trademark, service mark, or registered identification mark of an organization that performs or promotes elective abortions.

(c) Defining "promote." For purposes of subsection (b) of this section, the term "promote" means advancing, furthering, advocating, or popularizing elective abortion by, for example:

(1) taking affirmative action to secure elective abortion services for a TWHP client (such as making an appointment, obtaining consent for the elective abortion, arranging for transportation, negotiating a reduction in an elective abortion provider fee, or arranging or scheduling an elective abortion procedure); however, the term does not include providing upon the patient's request neutral, factual information and nondirective counseling, including the name, address, telephone number, and other relevant information about a provider;

(2) furnishing or displaying to a TWHP client information that publicizes or advertises an elective abortion service or provider; or

(3) using, displaying, or operating under a brand name, trademark, service mark, or registered identification mark of an organization that performs or promotes elective abortions.

(d) Compliance information. Upon request, a TWHP provider must provide DSHS or its designee with all information DSHS or its designee requires to determine the provider's compliance with this section.

(e) Provider disqualification. If, after the effective date of this section, DSHS or its designee determines that a TWHP provider fails to comply with subsection (b) of this section, DSHS or its designee will disqualify the provider from TWHP.

(f) Client assistance and recoupment. If a TWHP provider is disqualified, DSHS or its designee will take appropriate action to:

(1) assist a TWHP client to find an alternate provider; and

(2) recoup any funds paid to a disqualified provider for TWHP services performed during the period of disqualification.

(g) Certification. Upon initial application for enrollment in the TWHP, a provider must certify its compliance with subsection (b) of this section and any other requirement specified by DSHS or its designee. Each provider enrolled in TWHP must annually certify that the provider complies with subsection (b) of this section.

(h) Exemption from initial certification. The initial application requirement of subsection (g) of this section does not apply to a provider that certified and was determined to be in compliance with the requirements of the Women's Health Program administered by the Health and Human Services Commission pursuant to Human Resources Code, §32.024(c-1).

§39.41. Reimbursement.

(a) Reimbursement. Services provided through TWHP will be reimbursed in accordance with 1 TAC Chapter 355 (relating to Reimbursement Rates).

(b) Claims procedures. A TWHP provider must comply with 1 TAC Chapter 354, Subchapter A, Division 1 (relating to Medicaid Procedures for Providers) and Division 5 (relating to Physician and Physician Assistant Services).

(c) Improper use of reimbursement. A TWHP provider may not use any funds received for providing a covered service to pay the direct or indirect costs (including overhead, rent, phones, equipment, and utilities) of elective abortions.

§39.45. Severability.

(a) The Texas Legislature, in enacting Human Resources Code, §32.024(c-1), confirmed its intent that the Texas Women's Health Program, as successor to the Medicaid Women's Health Program, must be operated only in a manner that ensures:

(1) that no funds spent under the program are spent to perform or promote elective abortions; and

(2) compliance with the conditions specified in former Human Resources Code, §32.0248, which prohibit contracts with entities that perform or promote elective abortions and affiliates of such entities.

(b) DSHS, as the agency responsible for administering the TWHP, is subject to the conditions specified in Human Resources Code, §32.024(c-1). Its authority to operate the program is thus strictly limited, and DSHS has no authority to operate the TWHP except in compliance with such conditions.

(c) Section 39.33(1) of this title (relating to Definitions) and §39.38 of this title (relating to Health Care Providers) are necessary and integral to the implementation of the requirements of Human Resources Code, §32.024(c-1), the fulfillment of legislative intent, and the achievement of the objectives of the TWHP. As such, DSHS regards the provisions and application of these sections as essential aspects of DSHS's compliance with state law and, therefore, not severable from the other provisions of this subchapter.

(d) Accordingly, to the extent that §39.33(1), §39.38, or this section is determined by a court of competent jurisdiction to be unconstitutional or unenforceable, or to the degree an official or employee of DSHS, HHSC, or the State of Texas is enjoined from enforcing these sections, DSHS shall regard this entire subchapter as invalid and unenforceable and shall cease operation of the program.

(e) To the extent that any part of this subchapter other than §39.33(1), §39.38, or this section are enjoined, DSHS or its designee

may enforce the parts of the subchapter not affected by such injunctive relief to the extent that DSHS or its designee determines it can do so consistently with the legislative intent and the objectives of this subchapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 12, 2012.

TRD-201205342
Lisa Hernandez
General Counsel
Department of State Health Services
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Proposal publication date: July 6, 2012
For further information, please call: (512) 776-6972

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 3. ADMINISTRATIVE RESPONSIBILITIES OF STATE FACILITIES

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts an amendment to Subchapter A, §3.101, concerning definitions; and new Subchapter E, Death of an Individual, consisting of §3.501, concerning discovery; §3.502, concerning reporting and notification; §3.503, concerning medical certification of death and autopsies; §3.504, concerning disposition; §3.505, concerning clinical death review; §3.506, concerning administrative death review; §3.508, concerning state office mortality review; and §3.509, concerning independent mortality review, in Chapter 3, Administrative Responsibilities of State Facilities. The amendment to §3.101 and new §§3.501, 3.502, 3.503, 3.505, 3.506, 3.508, and 3.509 are adopted with changes to the proposed text published in the April 13, 2012, issue of the *Texas Register* (37 TexReg 2539). New §3.504 is adopted without changes to the proposed text. Section 3.507 is withdrawn because the agency has determined that the external facility peer review described in that section is duplicative of other reviews conducted in accordance with new Subchapter E and, therefore, unnecessary.

The amendment and new sections are adopted, in part, to implement Senate Bill (SB) 643, 81st Legislature, Regular Session, 2009. SB 643 requires a state supported living center (SSLC) to report the death of an individual to an entity designated to provide independent mortality reviews in accordance with Texas Health and Safety Code (THSC) Chapter 531. The adoption consolidates in Chapter 3 rules pertaining to requirements for reporting the death of an individual that are currently in Chapter 8, Subchapter K. The adopted repeal of Subchapter K in Chapter 8 is published elsewhere in this issue of the *Texas Register.*

DADS received written comments from Disability Rights Texas. A summary of the comments and responses follows.

Comment: The commenter stated concerns relating to the public oversight of policy development and requested greater specificity in promulgated rules.

Response: The agency believes that it has provided sufficient detail in the adopted rules to describe processes and protections related to the death of an individual who resides in a state facility. The agency also notes that it has made numerous amendments in response to comments, including new definitions and changes to §§3.501, 3.502, 3.505, 3.506, 3.508, and 3.509.

Comment: The commenter noted that the rule does not specifically designate which steps in the process are mandatory.

Response: The rule states that a facility or other entity "must" take certain actions, indicating that those actions are mandatory. No changes were made in response to the comment.

Comment: The commenter suggested adding definitions of "attending physician," "deceased," "designated representative," and "physician on duty."

Response: The agency agrees that clarifying the meaning of "attending physician" and "physician on duty" is helpful to understanding the roles of those physicians, so it has added those definitions. The agency also agrees that a definition of "designated representative" is helpful in understanding who will receive certain notices and information related to abuse, neglect, and exploitation investigations, as described in amendments to §3.305 that are published elsewhere in this issue. The agency does not agree that a definition of "deceased" is necessary.

Except in §3.503(a), the term is used as an adjective to describe an individual, not as a noun. The term "individual" is already defined and "deceased" has the word's ordinary meaning. The agency has corrected the use of "deceased" in §3.503(a) as a noun.

Comment: The commenter suggested adding the definitions of abuse, neglect, and exploitation as defined in the Department of Family and Protective Services (DFPS) definitions in 40 TAC Chapter 711.

Response: As stated in §3.301, the terms "abuse," "neglect," and "exploitation" have the meanings and classifications assigned in 40 TAC Chapter 711. The agency deliberately cross-references rules of the Department of Family and Protective Services because it is the agency with authority to define and investigate abuse, neglect, and exploitation. No changes were made in response to this comment.

Comment: With regard to §3.101, the commenter stated that the definition of "retaliation" does not make clear if "harassment, disciplinary action, discrimination, reprimand, threat, and criticism" are examples of retaliation or actions that a person may report that could result in retaliation.

Response: The agency agrees and has changed the definition to clarify that the actions listed are examples of retaliation. The term is used in Subchapter C, which prohibits retaliation for reporting an allegation of abuse, neglect, or exploitation.

Comment: In §3.501(a), the commenter suggested replacing the phrase "relevant evidence" with "any evidence relating to the death or cause of death."

Response: The agency agrees and made the change to clarify that the evidence must be related to the death or cause of death of the individual.

Comment: In §3.501(c)(3), the commenter suggested striking through the word "relevant" regarding the need to document information provided by the person who witnessed or discovered the death.

Response: The agency believes that simply removing the word "relevant" overly broadens the requirement. However, the agency changed the wording to be consistent with the wording used in §3.501(a) to clarify that the information recorded should relate to the individual's death or cause of death.

Comment: The commenter suggested adding the word "perform" to §3.501(d) to require the notified physician to "perform and document" the items listed in subsection (d)(1) - (4).

Response: The verb "perform" does not fit grammatically with the items in the list, and therefore the agency did not make the suggested change.

Comment: Regarding §3.501, the commenter stated that subsection (d)(1) appears to allow someone other than a physician to pronounce death.

Response: The agency agrees that §3.501(d)(1) is unclear and made the suggested change to indicate that a physician must pronounce death.

Comment: The commenter suggested adding the reporting language from Code of Criminal Procedure, Article 49.04 verbatim throughout §3.502.

Response: The agency responds that the requirements to report a death to the Office of Attorney General, a justice of the peace, the local police department, and the medical examiner are based on Texas Code of Criminal Procedure, Articles 49.04, 49.24 and 49.25. The proposal used the defined term "unusual circumstances" to make the rule more concise. However, the agency agrees that this approach may result in misinterpretation and, therefore, has listed the circumstances under which a death must be reported in the text of the rule and eliminated the term "unusual circumstances."

Comment: In §3.502(a)(7), the commenter asked why reporting to the entity designated to conduct independent mortality reviews must occur within 72 hours.

Response: The 72-hour time frame is a reporting requirement of the current independent mortality review organization. The agency agrees that a facility should report before 72 hours elapse, but the purpose of the rule is to set forth the maximum amount of time allowed to report a death.

Comment: In §3.503(c)(1), the commenter suggested adding information to indicate that a justice of the peace or medical examiner may order an autopsy in accordance with the Code of Criminal Procedure without requesting consent.

Response: A rule regarding what a justice of the peace or medical examiner may or may not do is not within the scope of the agency's authority. No changes were made in response to the comment.

Comment: Regarding §3.505(b), the commenter suggested listing the specific professional disciplines represented in the clinical death review committee.

Response: The agency agrees that it is helpful to list in the rule the specific disciplines represented on a facility's clinical death review committee. The agency has made the suggested change.

Comment: Regarding §3.505(c), the commenter suggested that the rule require the clinical death review committee to (1) review "medical and nursing care as well as other medically related services rendered," (2) recommend "when appropriate, changes in medically related policy and procedure, professional education, clinical operations, or patient care," and (3) submit a report to the administrative death review committee.

Response: The agency agrees that including more specificity regarding these topics would be beneficial to clarifying the role of the committee. However, the agency prefers to use the word "clinical" rather than "medical" or "nursing" to allow for a more interdisciplinary approach to the clinical death review process. The agency reworded the paragraph to include recommending and documenting changes in clinical policies and procedures, professional education, clinical operations, and patient care.

Comment: Regarding §3.506, the commenter suggested adding "relevant to the circumstances of the death being reviewed" to describe which professional staff would be asked to participate in an administrative death review. The commenter also suggested adding a member of the public.

Response: The agency made the change to clarify that the professional discipline must be relevant to the circumstances of the death being reviewed. The administrative death review process is an internal quality assurance function of the facility and, therefore, the agency declines to add a member of the public to the administrative death review committee. However, the facility receives mandatory external review from the independent mortality review organization described in §3.509.

Comment: Regarding §3.506(c), the commenter suggested that the rule require the administrative death review committee to (1) review recommendations or act on the recommendations of the clinical death review committee, (2) formulate written recommendations, if appropriate, and (3) submit a report and review certain documents.

Response: The agency agrees to clarify the role of the administrative death review committee and has reworded §3.506(c) to reflect this change.

Comment: Regarding §3.506(c), the commenter also suggested adding a specific list of documents that the administrative death review committee would review.

Response: The agency does not want to list specific documents to be reviewed by the administrative death review committee because each situation is different and the facts of the situation will dictate which documents should be reviewed.

Comment: Regarding §3.507, relating to external facility peer review, the commenter stated that it was not clear if §3.507 applies to every death.

Response: Section 3.507 is being withdrawn because it duplicates other reviews described in the subchapter.

Comment: The commenter suggested specifying which circumstances trigger a state office mortality review in §3.508.

Response: The agency agrees and has added the circumstances under which a state office mortality review must be conducted.

Comment: Regarding §3.509, the commenter stated that the phrase "the entity designated to provide independent mortality reviews in accordance with Texas Health and Safety Code (THSC) Chapter 531" was confusing.

Response: "Independent mortality review organization" is now a defined term that means "the independent organization designated in accordance with Texas Government Code, Chapter 531, Subchapter U, to review the death of an individual." References to the entity in §§3.502, 3.508, and 3.509 were replaced with "the independent mortality review organization" to be concise and clear. The reference to Chapter 531 of the Texas Health and Safety Code has been corrected to reference the Texas Government Code.

Comment: The commenter suggested changing "may" to "shall" in §3.509(a) to emphasize that the independent mortality review is required.

Response: The agency agrees, but used "must" rather than "shall" to be consistent with terminology used in other rules.

Comment: Regarding §3.509(c), the commenter suggested replacing "if appropriate" with a more specific qualifier to indicate when recommendations resulting from an independent mortality review may not be implemented.

Response: The agency has amended the subsection to reflect that all recommendations of the independent mortality review organization must be reviewed, but the facility director has the discretion to implement only recommendations determined to be appropriate.

In accordance with changes to Subchapter C of this chapter, relating to abuse, neglect, and exploitation, published elsewhere in this issue of the *Texas Register,* the agency added definitions for the terms "designated representative" and "protection and advocacy organization" in §3.101.

Also in §3.101, the definition of "direct support professional" has been moved to appear alphabetically in the defined terms.

In §3.505, the time period for conducting a clinical death review has been extended from 14 to 21 days after an individual's death to more accurately reflect the time routinely necessary to obtain documents from other sources, including hospital records and autopsy results.

SUBCHAPTER A. DEFINITIONS

40 TAC §3.101

The amendment is adopted under Texas Government Code §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

§3.101. Definitions.

The following words and terms, when used in this chapter (relating to Administrative Responsibilities of State Facilities), have the following meanings, unless the context clearly indicates otherwise:

(1) Administrative death review--An administrative, quality-assurance activity related to the death of an individual to identify non-clinical problems requiring correction and opportunities to improve the quality of care at a facility.

(2) Alleged offender--An individual who was committed or transferred to a facility:

(A) under Code of Criminal Procedure, Chapters 46B or 46C, as a result of being charged with or convicted of a criminal offense; or

(B) under Family Code, Chapter 55, as a result of being alleged by petition or having been found to have engaged in delinquent conduct constituting a criminal offense.

(3) Allegation--A report by a person suspecting or having knowledge that an individual has been or is in a state of abuse, neglect, or exploitation as defined in this chapter.

(4) Applicant--A person who has applied to be an employee, volunteer, or unpaid professional intern.

(5) Attending physician--The physician who has primary responsibility for the treatment and care of an individual.

(6) CANRS--The client abuse and neglect reporting system maintained by DADS Consumer Rights and Services.

(7) Child--An individual less than 18 years of age who is not and has not been married and who has not had the disabilities of minority removed pursuant to the Texas Family Code, Chapter 31.

(8) Clinical death review--A clinical, quality-assurance, peer review activity related to the death of an individual and conducted in accordance with statutes that authorize peer review in Texas to identify clinical problems requiring correction and opportunities to improve the quality of care at a facility.

(9) Clinical practice--The demonstration of professional competence in nursing, dental, pharmacy, or medical practice as described in the relevant chapter of the Texas Occupations Code.

(10) Confirmed--Term used to describe an allegation that DFPS determines is supported by a preponderance of the evidence.

(11) Contractor--A person who contracts with a facility to provide services to an individual, including an independent school district that provides educational services at the facility.

(12) Conviction--The adjudication of guilt for a criminal offense.

(13) DADS--Department of Aging and Disability Services.

(14) Deferred adjudication--Has the meaning given to "community supervision" in Texas Code of Criminal Procedure, §42.12, Section 2.

(15) Designated representative--A person designated by an individual or an individual's LAR to be a spokesperson or advocate for the individual.

(16) DFPS--Department of Family and Protective Services.

(17) Director--The director of a facility or the director's designee.

(18) Direct support professional--An unlicensed employee who directly provides services to an individual.

(19) Employee--A person employed by DADS whose assigned duty station is at a facility.

(20) Facility--A state supported living center or the ICF/ID component of the Rio Grande State Center.

(21) Family member--An individual's parent, spouse, children, or siblings.

(22) Forensic facility--A facility designated under Texas Health and Safety Code (THSC), §555.002(a) for the care of high-risk alleged offenders.

(23) Guardian--An individual appointed and qualified as a guardian of the person under the Texas Probate Code, Chapter XII.

(24) High-risk alleged offender--An alleged offender who has been determined to be at risk of inflicting substantial physical harm to another person in accordance with THSC §555.003.

(25) Inconclusive--Term used to describe an allegation leading to no conclusion or definite result by DFPS due to lack of witnesses or other relevant evidence.

(26) Independent mortality review organization--An independent organization designated in accordance with Texas Government Code, Chapter 531, Subchapter U, to review the death of an individual.

(27) Individual--A person with a developmental disability receiving services from a facility.

(28) Individual support plan--An integrated, coherent, person-directed plan that reflects an individual's preferences, strengths, needs, and personal vision, as well as the protections, supports, and services the individual will receive to accomplish identified goals and objectives.

(29) Interdisciplinary team--An interdisciplinary team with the active participation of the individual and LAR, that is responsible for assessing the individual's treatment, training, and habilitation needs and making recommendations for services based on the personal goals and preferences of the individual using a person-directed planning process, including recommendations on whether the individual is best served in a facility or community setting.

(30) Legally authorized representative (LAR)--A person authorized by law to act on behalf of an individual, including a parent, guardian, or managing conservator of a minor individual, or a guardian of an adult individual.

(31) Life-sustaining medical treatment--Treatment that, based on reasonable medical judgment, sustains the life of an individual and without which the individual will die. The term includes both life-sustaining medications and artificial life support such as mechanical breathing machines, kidney dialysis treatment, and artificial nutrition and hydration. The term does not include the administration of pain management medication or the performance of a medical procedure considered necessary to provide comfort care or any other medical care provided to alleviate an individual's pain.

(32) Mental health services provider--Has the meaning assigned in the Texas Civil Practice and Remedies Code, Chapter 81.

(33) Peer review--A review of clinical or professional practice of a doctor, pharmacist, licensed vocational nurse, or registered nurse conducted by his or her professional peers.

(34) Perpetrator--A person who has committed an act of abuse, neglect, or exploitation.

(35) Person--Includes a corporation, organization, governmental subdivision or agency, or any other legal entity.

(36) Physician on duty--The physician designated by the facility's medical director to provide medical care or respond to emergencies outside regular working hours.

(37) Positive behavior support plan--A comprehensive, individualized plan that contains intervention strategies designed to modify the environment, teach or increase adaptive skills, and reduce or prevent the occurrence of target behaviors through interventions that build on an individual's strengths and preferences, without using aversive or punishment contingencies.

(38) Preponderance of the evidence--The greater weight of evidence, or evidence that is more credible and convincing to the mind.

(39) Primary contact--The person designated as the primary contact of an alleged victim of abuse, neglect, or exploitation, if the alleged victim is an adult with an intellectual disability who is unable to authorize the disclosure of protected health information and does not have a guardian.

(40) Protection and advocacy organization--the protection and advocacy agent for Texas designated in accordance with the Code of Federal Regulations, Title 45, §1386.20.

(41) Registered nurse--A nurse licensed by the Texas Board of Nursing to practice professional nursing in Texas.

(42) Registries--

(A) the Nurse Aide Registry maintained by DADS in accordance with §94.10 of this title (relating to Registry, Findings, and Inquiries); and

(B) the Employee Misconduct Registry maintained by DADS in accordance with Chapter 93 of this title (relating to Employee Misconduct Registry (EMR)).

(43) Reporter--A person who reports an allegation of abuse, neglect, or exploitation.

(44) Retaliation--An action intended to inflict emotional or physical harm or inconvenience on a person including harassment, disciplinary action, discrimination, reprimand, threat, and criticism.

(45) SSLC--A state supported living center.

(46) State office mortality review--A quality assurance activity to review data related to the death of an individual to identify trends, best practices, training needs, policy changes, or facility or systemic issues that need to be addressed to improve services at facilities.

(47) Unconfirmed--Term used to describe an allegation that DFPS determines is not supported by the preponderance of evidence.

(48) Unfounded--Term used to describe an allegation that DFPS determines is spurious or patently without factual basis.

(49) Unusual incident--An event or situation that seriously threatens the health, safety, or life of an individual.

(50) Volunteer--A person who is not part of a visiting group, who has active, direct contact with an individual, and who does not receive compensation from DADS other than reimbursement for actual expenses.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 9, 2012.

TRD-201205245
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: October 29, 2012
Proposal publication date: April 13, 2012
For further information, please call: (512) 438-4162

SUBCHAPTER E. DEATH OF AN INDIVIDUAL

40 TAC §§3.501 - 3.506, 3.508, 3.509

The new sections are adopted under Texas Government Code §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

§3.501. Discovery.

(a) A person witnessing the death of an individual or discovering a deceased individual must immediately notify a registered nurse. An employee must take steps to preserve any evidence relating to the death or cause of death in accordance with DADS policy.

(b) Unless the individual is the subject of an out-of-hospital do-not-resuscitate order, cardiopulmonary resuscitation must be initiated and continued until a physician pronounces death or directs such treatment to cease.

(c) A registered nurse must notify the attending physician or physician on duty and document the following information in the individual's record:

(1) the date, time, and location of death or discovery of the deceased individual;

(2) the name of the physician notified, the time and date of notification, and the name of the staff member who notified the physician;

(3) the name of any person who witnessed the death or discovered the deceased individual and any information relating to the death or cause of death provided by that person; and

(4) a detailed description of any treatment given or emergency procedures initiated immediately before death or upon discovery of the deceased individual and the individual's response to the treatment or procedures.

(d) The notified physician must document the following information:

(1) the identity of the individual;

(2) the physician's findings upon examination, and pronouncement of death;

(3) the date, time, and probable cause of death (if known);

(4) whether the death occurred under unusual circumstances, the cause of death is unknown, or death occurred pursuant to treatment; and

(5) a detailed description of any treatment given or emergency procedures initiated immediately before death or upon discovery of the deceased individual and the individual's response to the treatment or procedures.

(e) If the death was related to an injury, staff must complete required documentation in accordance with DADS policy.

(f) Each death is investigated in accordance with state and federal law and DADS policy on incident management.

§3.502. Reporting and Notification.

(a) Reporting requirements.

(1) A facility must designate responsibility for each reporting requirement described in this section to a specific staff position or positions.

(2) A facility must report the death of an individual to DADS Consumer Rights and Services within 24 hours after the pronouncement of death.

(3) A facility must report the death of an individual to the Office of the Attorney General within 24 hours after the pronouncement of death if:

(A) the death occurred within 24 hours after admission to a hospital or institution;

(B) the death was unnatural or occurred in the absence of one or more good witnesses;

(C) the circumstances of the death indicate that the death may have been caused by unlawful means;

(D) the person committed suicide or the circumstances of the death indicate that the death may have been cause by suicide;

(E) a physician cannot certify the cause of death in accordance with Texas Health and Safety Code (THSC) Chapter 193; or

(F) the individual was less than six years of age at the time of death.

(4) A facility must report the death of an individual to DFPS within one hour after the pronouncement of death if abuse or neglect is suspected or the death resulted from an injury.

(5) Except as provided in paragraph (6) of this subsection, a facility must report the death of an individual to the local medical examiner or police department immediately after the pronouncement of death under any of the circumstances listed in paragraph (3)(A) - (F) of this subsection.

(6) If a death occurs in a county that does not have a medical examiner's office or that is not part of a medical examiner's district, a facility must report the death of an individual to the local justice of the peace immediately after the pronouncement of death under any of the circumstances listed in paragraph (3)(A) - (F) of this subsection.

(7) A facility must report the death of an individual to the independent mortality review organization within 72 hours after pronouncement of death in accordance with the operating procedures of the independent mortality review organization.

(b) Notification requirement. A facility must:

(1) promptly notify a family member or LAR of a deceased individual that the individual has died;

(2) explain the circumstances of the death to the family member or LAR; and

(3) inform the family member or LAR that the family member or LAR may examine:

(A) any medical information relevant to the death;

(B) the individual's certificate of death; and

(C) autopsy findings, if one is performed.

§3.503. Medical Certification of Death and Autopsies.

(a) Death Certificate.

(1) A facility must obtain a death certificate for an individual who dies while receiving services from the facility.

(2) The facility must ensure that a copy of the death certificate is retained in the deceased individual's record. Any additional findings that would reflect on the information contained in the original certificate should be filed as required by law and a copy of the amended death certificate must be retained in the deceased individual's record.

(b) Medical Certification. A facility physician must complete the medical certificate described in Texas Health and Safety Code Chapter 193 if required to do so by law.

(c) Autopsy.

(1) The medical director or designee must request consent for an autopsy to be performed on a deceased individual when:

(A) the cause of death is uncertain;

(B) the death occurred under unusual circumstances; or

(C) the autopsy would provide information related to the individual's diagnosis and efficacy of treatment choices.

(2) Except as provided in paragraph (3) of this subsection, consent for an autopsy must be requested from one of the following persons, in the following order of preference:

(A) an LAR;

(B) a family member; or

(C) if there is no known LAR or family member, the director of the facility.

(3) If the individual was survived by a spouse or an adult child, consent for an autopsy must be requested from the spouse or adult child.

(4) When requesting consent from a person, facility staff must explain to the person what an autopsy is and why it is appropriate or desirable under the circumstances. Autopsy reports are maintained in the individual's clinical record.

§3.505. Clinical Death Review.

(a) A facility must conduct a clinical death review within 21 days after an individual's death, unless justification for a longer period of time is documented and an extension of time is approved by the director.

(b) The facility's Clinical Death Review Committee, which consists of ten employees representing a variety of professional disciplines, including medical, clinical, psychological, dietary, and habilitation staff, conducts the clinical death review. At least seven members of the committee must participate in the review.

(c) The Clinical Death Review Committee must:

(1) review the cause of death and the quality of clinical care and services an individual received before death;

(2) recommend, when appropriate, changes in clinical policies and procedures, professional education, clinical operations, and patient care; and

(3) document its recommendations.

§3.506. Administrative Death Review.

(a) A facility must conduct an administrative death review within 14 days after a clinical death review is complete.

(b) The facility's Administrative Death Review Committee, which consists of eight employees representing administration, direct contact staff, and a variety of professional disciplines relevant to the circumstances of the death being reviewed, conducts the administrative death review. At least five members of the committee must participate in the review.

(c) The Administrative Death Review Committee must:

(1) review the circumstances, policies, procedures, and systems involved in providing care to an individual before death;

(2) review recommendations of the Clinical Death Review Committee and act upon such recommendations as appropriate; and

(3) document its recommendations.

§3.508. State Office Mortality Review.

(a) The State Office Mortality Review Committee, which consists of DADS state office employees who are responsible for coordinating statewide professional services in the areas of medical care, nursing services, habilitation therapy, and quality assurance, must conduct a state office mortality review after the death of an individual if:

(1) the death occurred within 24 hours after admission to a hospital or institution;

(2) the death was unnatural;

(3) the death occurred without a good witness;

(4) the circumstances indicate that the death may have been caused by unlawful means;

(5) the circumstances of the death indicate that the death was or may have been caused by suicide;

(6) an individual's death occurred soon after an accident, an injury, or the application of restraint;

(7) the circumstances indicate that further review may help DADS identify factors that will lead to system-wide improvement; or

(8) the DADS State Office Medical Services Coordinator determines a review would be beneficial.

(b) The State Office Mortality Review Committee may request documentation from a facility. The facility must provide the requested documentation within 35 days after the request.

(c) The State Office Mortality Review Committee must review the requested documentation, along with any recommendations from the independent mortality review organization, and develop recommendations to improve care and services in facilities.

§3.509. Independent Mortality Review.

(a) The independent mortality review organization must conduct an independent mortality review after the death of an individual.

(b) The independent mortality review organization may request documentation from a facility in accordance with state or federal law and the independent mortality review organization's operating procedures. The facility must provide the requested documentation in accordance with the independent mortality review organization's operating procedures.

(c) A facility director must ensure that recommendations made as the result of an independent mortality review are reviewed and, if appropriate, implemented.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 9, 2012.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-4162

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SUBCHAPTER C. ABUSE, NEGLECT, AND EXPLOITATION

40 TAC §3.303, §3.305

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §3.303, concerning prohibition against retaliation, and §3.305, concerning completion of an investigation, in Chapter 3, Administrative Responsibilities of State Facilities, with changes to the proposed text as published in the April 13, 2012, issue of the *Texas Register* (37 TexReg 2544).

The amendments are adopted to correct information in rule regarding the process for reporting an allegation that an employee of a state facility has been subjected to retaliation for reporting alleged abuse, neglect, or exploitation. In addition, the amendments specify that an employee of a state facility must be provided written notice if disciplinary action is taken against the employee based on a confirmation of abuse, neglect, or exploitation. Furthermore, if the employee requests a copy of the investigative report, the employee must acknowledge that the report is confidential before the employee is given or reviews the report.

In accordance with changes to §3.101, Definitions, published elsewhere in this issue of the *Texas Register,* a change was made to the text of §3.303(c) to clarify that DADS may take disciplinary action against an employee who retaliates against a person who in good faith reports an allegation of abuse, neglect, or exploitation.

DADS received written comments from Disability Rights Texas. A summary of the comments and the responses follows.

Comment: Regarding §3.303(b), the commenter stated that any person may contact the Office of the Attorney General (OAG) or the Office of the Inspector General (OIG) to report retaliation.

Response: The OAG or OIG will accept reports of alleged violations of Texas Government Code, Chapter 554, known as the Whistleblower Act, which protects public employees from retaliation. Accordingly, §3.303(b)(1) applies only to employees who believe they have been subjected to adverse personnel action as a result of reporting abuse, neglect, or exploitation (ANE). The provision was amended for clarity.

Comment: Regarding §3.305(c), (g), and (k), the commenter suggested replacing "an alleged victim, an alleged victim's guardian or primary contact, or the parent if the alleged victim is a child" with "an alleged victim or an alleged victim's designated representative, LAR, or primary contact."

Response: The agency agrees that using defined terms clarifies which persons are subject to §3.305(c), (g), and (k). Therefore, definitions of "legally authorized representative" and "designated representative" are being adopted in §3.101, relating to definitions, as published elsewhere in this issue of the *Texas Register.* The agency has amended subsections (c), (g), and (k) to require that an alleged victim or an alleged victim's designated representative, legally authorized representative (LAR), or primary contact receive the notifications and information referenced in those subsections.

Comment: Regarding §3.305(c)(2), the commenter suggested changing the wording of the parenthetical note to reflect that the name "Advocacy, Incorporated" is now "Disability Rights Texas."

Response: The parenthetical note contains the title of 40 Texas Administrative Code Part 19, Chapter 711, Subchapter M. Therefore, making the suggested change would result in an incorrect cross-reference. No changes were made in response to this comment.

Comment: The commenter noted that §3.305(c)(3) and §3.305(k) appear to be inconsistent because §3.305(c)(3) states that certain persons have the right to a copy of the final investigation report upon request and §3.305(k) allows DADS to charge a copying fee for providing the report. The commenter states that this would impede a person's right to obtain the copy.

Response: The agency does not currently charge for copies of the investigative report, so it has deleted the statement in §3.305(k) allowing a director to charge for copies of an investigative report.

Comment: Regarding §3.305(f), the commenter noted that the requirement for the facility to have a mechanism to evaluate identified trends did not include a follow-through component and suggested adding the phrase "and develop a plan of correction."

Response: The agency agrees that follow-through on identified trends is important, but does not believe every pattern or trend requires a plan of correction. The subsection was revised by adding the following phrase: "and take action to address the patterns or trends."

Comment: Regarding §3.305(h), the commenter asked why the subsection was limited to confirmed allegations of Class I abuse, stating that the protection and advocacy organization should receive notice if a confirmed perpetrator of abuse or neglect requests a grievance hearing.

Response: The agency agrees that the protection and advocacy organization should receive the notice described in subsection (h) if the organization has notified the director in writing that it represents a victim of any category of abuse or neglect. In addition, a definition of "protection and advocacy organization" has been added to 40 TAC §3.101, as published elsewhere in this issue of the *Texas Register,* to clarify that it means the agency in Texas designated in accordance with Code of Federal Regulations, Title 45, §1386.20. The term is also now used in §3.305(k).

Comment: Regarding §3.305(i), the commenter noted that, while the agency is required to notify a professional's licensing board of a confirmation of abuse, neglect, or exploitation, the requirement does not address maintaining documentation that the licensing board has been notified.

Response: The agency agrees and has made the suggested change to this provision.

Comment: Regarding §3.305(j), the commenter asked the agency to define peer review processes and explain where peer review documentation can be accessed upon completion.

Response: The agency responds that "peer review" is defined in §3.101. A facility follows peer review procedures that are based on the requirements of each profession's practice act. Peer re-

view documentation is protected from disclosure except under limited circumstances when disclosure is allowed by law. No changes were made in response to this comment, but the subsection was amended to clarify that if the Department of Family and Protective Services determines that an allegation involves clinical practice rather than abuse, neglect, or exploitation, the facility must conduct an investigation to determine if the allegation meets the licensing board's criteria for peer review.

Comment: Regarding §3.305(k), the commenter suggested adding a requirement that the director provide an unredacted copy of an investigative report to the protection and advocacy agency upon request.

Response: The agency agrees and changed the rule to require a director to provide an unredacted copy of an investigative report to the protection and advocacy organization upon request if the organization is the alleged victim's designated representative.

The amendments are adopted under Texas Government Code §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

§3.303. Prohibition Against Retaliation.

(a) A facility may not retaliate against a person who in good faith reports an allegation.

(b) A person who believes he or she has been subjected to retaliation as a result of reporting an allegation, or who believes an allegation has been ignored, may contact the director of the facility where the alleged abuse, neglect, or exploitation occurred or DADS state office. An employee may also contact:

(1) The Office of the Attorney General at (512) 463-2185 (Consumer Protection Division), if the employee believes adverse personnel action was taken against him or her in violation of Texas Government Code, Chapter 554; or

(2) The Office of Inspector General at 1-800-436-6184.

(c) DADS may take disciplinary action, including termination, against an employee who retaliates against a person who in good faith reports an allegation.

§3.305. Completion of an Investigation.

(a) A director may not change a confirmed finding by DFPS. However, a director may change an unconfirmed, inconclusive, or unfounded finding to a confirmed finding. If the director changes a finding to confirmed, the confirmed finding may not be appealed to DFPS.

(b) A facility has the appeal and review rights specified in Chapter 711, Subchapter K, of this title (relating to Requesting a Review of Finding If You Are the Administrator or Contractor CEO). The final finding is a finding that is uncontested by the facility.

(c) A director must ensure that an alleged victim or an alleged victim's designated representative, LAR, or primary contact is promptly notified of:

(1) a final finding;

(2) the method of appealing the final finding as described in Chapter 711, Subchapter M, of this title (relating to Requesting an Appeal If You Are the Reporter, Alleged Victim, Legal Guardian, or With Advocacy, Incorporated), if the final finding was not made by the director; and

(3) the right to receive a copy of the investigative report upon request.

(d) A director must inform a perpetrator or alleged perpetrator of a final finding.

(e) If an employee is confirmed to have abused, neglected, or exploited an individual, the director of the facility at which the person is employed must take disciplinary action against the employee in accordance with DADS operational procedures.

(1) The director must notify the employee in writing of the disciplinary action being taken and of any right that the employee may have under DADS operational procedures to file a complaint or request a grievance hearing.

(2) If the employee makes a written request to the director for a copy of the investigative report and acknowledges in writing that the contents of the report must be kept confidential, the director must provide the employee with a copy of or access to the investigative report.

(f) A facility must establish and implement a mechanism to evaluate problematic patterns or trends identified by a DFPS investigator or the facility and take action to address the patterns or trends.

(g) A director must ensure that an alleged victim or an alleged victim's designated representative, LAR, or primary contact is promptly notified of:

(1) the disciplinary action taken against the perpetrator;

(2) an employee's right to request a grievance hearing to dispute disciplinary action; and

(3) the opportunity to be informed if an employee files a grievance.

(h) If the state's protection and advocacy organization informs a director in writing that it represents the victim of confirmed abuse or neglect, the director must notify the protection and advocacy organization if a perpetrator requests a grievance hearing.

(i) If DFPS confirms abuse, neglect, or exploitation and the perpetrator is a licensed professional, the director of the facility where the perpetrator is employed must ensure that the appropriate licensing board is notified of the confirmation and documentation of the notification is maintained.

(j) If an alleged perpetrator is a physician, registered nurse, licensed vocational nurse, or pharmacist, and the DFPS investigator determines that the allegation involves clinical practice rather than abuse, neglect, or exploitation, the facility where the alleged perpetrator is employed must conduct an investigation to determine if the allegation meets the licensing board's criteria for peer review and ensure that the appropriate licensing board is notified in accordance with DADS operational procedures.

(k) Upon request, a director must provide a copy of an investigative report to an alleged victim or an alleged victim's designated representative, LAR, or primary contact with the identities of other persons served and any information determined confidential by law concealed. If the designated representative is the protection and advocacy organization, the director must provide an unredacted copy of the investigative report.

(l) A facility must report a confirmed finding of abuse, neglect, or exploitation against an employee of the facility to CANRS.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 9, 2012.

TRD-201205243
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-4466

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CHAPTER 8. CLIENT CARE--INTELLECTUAL DISABILITY SERVICES
SUBCHAPTER K. DEATHS OF PERSONS SERVED BY STATE FACILITIES OR COMMUNITY CENTERS

40 TAC §§8.261 - 8.277, 8.279

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts the repeal of Subchapter K, §§8.261 - 8.277 and 8.279, concerning deaths of persons served by state facilities or community centers, in Chapter 8, Client Care--Intellectual Disability Services, without changes to the proposal as published in the April 13, 2012, issue of the *Texas Register* (37 TexReg 2546).

The repeal is adopted to remove requirements for investigating the death of an individual from the Chapter 8 rules. New rules in Chapter 3, published elsewhere in this issue of the *Texas Register,* incorporate requirements for state supported living centers.

DADS received no comments regarding adoption of the repeal.

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 9, 2012.

TRD-201205247
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: October 29, 2012
Proposal publication date: April 13, 2012
For further information, please call: (512) 438-4162

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Agency Rule Review Plans

State Board for Educator Certification

Title 19, Part 7

TRD-201205353
Filed: October 15, 2012

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Proposed Rule Reviews

State Board for Educator Certification

Title 19, Part 7

The State Board for Educator Certification (SBEC) proposes the review of 19 TAC Chapter 241, Principal Certificate, pursuant to the Texas Government Code, §2001.039.

As required by the Texas Government Code, §2001.039, the SBEC will accept comments as to whether the reasons for adopting 19 TAC Chapter 241 continue to exist. The comment period begins October 26, 2012, and ends following receipt of public comments on the rule review of 19 TAC Chapter 241 at the next regularly scheduled SBEC meeting to be held on February 8, 2013.

Comments or questions regarding this rule review may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494, (512) 475-1497. Comments may also be submitted electronically to sbecrules@tea.state.tx.us or faxed to (512) 463-5337. Comments should be identified as "SBEC Rule Review."

TRD-201205351
Cristina De La Fuente-Valadez
Director, Rulemaking, Texas Education Agency
State Board for Educator Certification
Filed: October 15, 2012

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The State Board for Educator Certification (SBEC) proposes the review of 19 TAC Chapter 242, Superintendent Certificate, pursuant to the Texas Government Code, §2001.039.

As required by the Texas Government Code, §2001.039, the SBEC will accept comments as to whether the reasons for adopting 19 TAC Chapter 242 continue to exist. The comment period begins October 26, 2012, and ends following receipt of public comments on the rule review of 19 TAC Chapter 242 at the next regularly scheduled SBEC meeting to be held on February 8, 2013.

Comments or questions regarding this rule review may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494, (512) 475-1497. Comments may also be submitted electronically to sbecrules@tea.state.tx.us or faxed to (512) 463-5337. Comments should be identified as "SBEC Rule Review."

TRD-201205352
Cristina De La Fuente-Valadez
Director, Rulemaking, Texas Education Agency
State Board for Educator Certification
Filed: October 15, 2012

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Commission on State Emergency Communications

Title 1, Part 12

The Commission on State Emergency Communications (CSEC) will review and consider whether to readopt, readopt with amendments, or repeal the rules in Title 1, Part 12, Texas Administrative Code, Chapter 251, Regional Plans--Standards. This review is conducted in accordance with Government Code §2001.039.

CSEC has conducted a preliminary review of Chapter 251 and determined that the reasons for initially adopting the chapter continue to exist.

All comments or questions regarding this review may be submitted in writing within 60 days following publication of this notice in the *Texas Register* to Patrick Tyler, General Counsel, Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942; by facsimile to (512) 305-6937; or by email to csecinfo@csec.texas.gov. Any proposed changes to Chapter 251 will be published for comment in the "Proposed Rules" section of a subsequent issue of the *Texas Register.*

§251.1. Regional Strategic Plans for 9-1-1 Service.

§251.2. Guidelines for Changing or Extending 9-1-1 Service Arrangements.

§251.3. Use of Revenue in Certain Counties.

§251.4. Guidelines for Accessibility Equipment.

§251.5. Guidelines for Management and Disposition of 9-1-1 Equipment and Controlled Assets.

§251.7. Guidelines for Implementing Integrated Services.

§251.8. Guidelines for the Procurement of 9-1-1 Equipment and Services with 9-1-1 Funds.

§251.10. Guidelines for Implementing Wireless E9-1-1 Service.

§251.11. Monitoring Policies and Procedures.

§251.12. Contracts for 9-1-1 Services.

§251.13. The Use of the 9-1-1 Database for Emergency Notification Services.

TRD-201205280
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Filed: October 10, 2012

♦ ♦ ♦

The Commission on State Emergency Communications (CSEC) will review and consider whether to readopt, readopt with amendments, or repeal the rules in Title 1, Part 12, Texas Administrative Code, Chapter 253, Practice and Procedure. This review is conducted in accordance with Government Code §2001.039.

CSEC has conducted a preliminary review of Chapter 253 and determined that the reasons for initially adopting the chapter continue to exist.

All comments or questions regarding this review may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Patrick Tyler, General Counsel, Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942; by facsimile to (512) 305-6937; or by email to csecinfo@csec.texas.gov. Any proposed changes to Chapter 253 will be published for comment in the "Proposed Rules" section of a subsequent issue of the *Texas Register*.

§253.1. Petitions for Rulemaking before the Commission.

§253.2. Bid Opening and Tabulation.

§253.3. Protest Procedures.

§253.4. Negotiated Rulemaking and Alternative Dispute Resolution.

TRD-201205283
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Filed: October 10, 2012

♦ ♦ ♦

Adopted Rule Reviews

Commission on State Emergency Communications

Title 1, Part 12

The Commission on State Emergency Communications (CSEC) has concluded its review of its Chapter 252 rules and readopts without amendment §§252.1 - 252.5 and 252.7 - 252.9; readopts with amendments §252.6 which appeared in the August 17, 2012, issue of the *Texas Register* (37 TexReg 6295). Proposed amendments to §252.7 were published in the May 25, 2012, issue of the *Texas Register* (37 TexReg 3773); and withdrawn by CSEC on October 10, 2012. The notice of withdrawn amendments to §252.7 will appear in the "Withdrawn Rules" section in this issue of the *Texas Register*.

CSEC's notice of intent to review the Chapter 252 rules was published in the February 24, 2012, issue of the *Texas Register* (37 TexReg 1366). The review assessed whether the original reasons for adopting the rules continue to exist. CSEC reviewed each rule in Chapter 252 and determined that the original justification for the rules continues to exist.

No comments were received regarding CSEC's notice of review. This notice concludes CSEC's review of its Chapter 252 rules.

TRD-201205281
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Filed: October 10, 2012

♦ ♦ ♦

Texas Department of Licensing and Regulation

Title 16, Part 4

The Texas Department of Licensing and Regulation (Department) filed a notice of intent to review and consider for readoption, revision, or repeal Texas Administrative Code (TAC), Title 16, Chapter 76, concerning Water Well Drillers and Water Well Pump Installers. Texas Government Code §2001.039 requires state agencies to review their rules every four years to determine if the reasons for initially adopting the rules continue to exist. The rules implementing the Water Well Drillers and Water Well Pump Installers program under Texas Occupations Code, Chapter 1901 and 1902, were scheduled for this four-year review.

The Notice of Intent to Review 16 TAC Chapter 76 was published in the June 1, 2012, issue of the *Texas Register* (37 TexReg 4071). The Department reviewed these rules and determined that the rules are still essential in implementing the statutory provisions of Texas Occupations Code, Chapter 1901, concerning Water Well Drillers, and Chapter 1902, concerning Water Well Pump Installers. The rules provide details that are not found in the program statute but are necessary for implementation and operation of this program. For example, the rules detail the registration/licensing requirements and the fees that are specific to this program. In addition, Texas Occupations Code §1901.052 and §1902.052 specifically require that rules be adopted for this program.

The Notice of Intent to Review was distributed to persons internal and external to the agency, and the public comment period closed on August 17, 2012. The Department received no public comments in response to the Notice of Intent to Review.

The Texas Commission of Licensing and Regulation (Commission), the Department's governing body, readopted 16 TAC Chapter 76 in its current form. The Department may propose amendments in the future that may further clarify or supplement the existing rules. Any future proposed changes to the rules will be published in the Proposed Rules section of the *Texas Register* and will be open for public comment prior to final adoption by the Commission in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

The rules are readopted by the Commission in accordance with Texas Government Code, §2001.039. This concludes the review of 16 TAC Chapter 76.

TRD-201205378
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: October 16, 2012

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 1 TAC §354.1634(h)(1)

	Second Demonstration Year	Third Demonstration Year	Fourth Demonstration Year	Fifth Demonstration Year
Category 1 and Category 2	No more than 85%	No more than 80%	No more than 75%	No more than 57%
Category 3	At least 10 %	At least 10%	At least 15%	At least 33%
Category 4	5%	10 - 15%	10 - 15%	10 - 15%

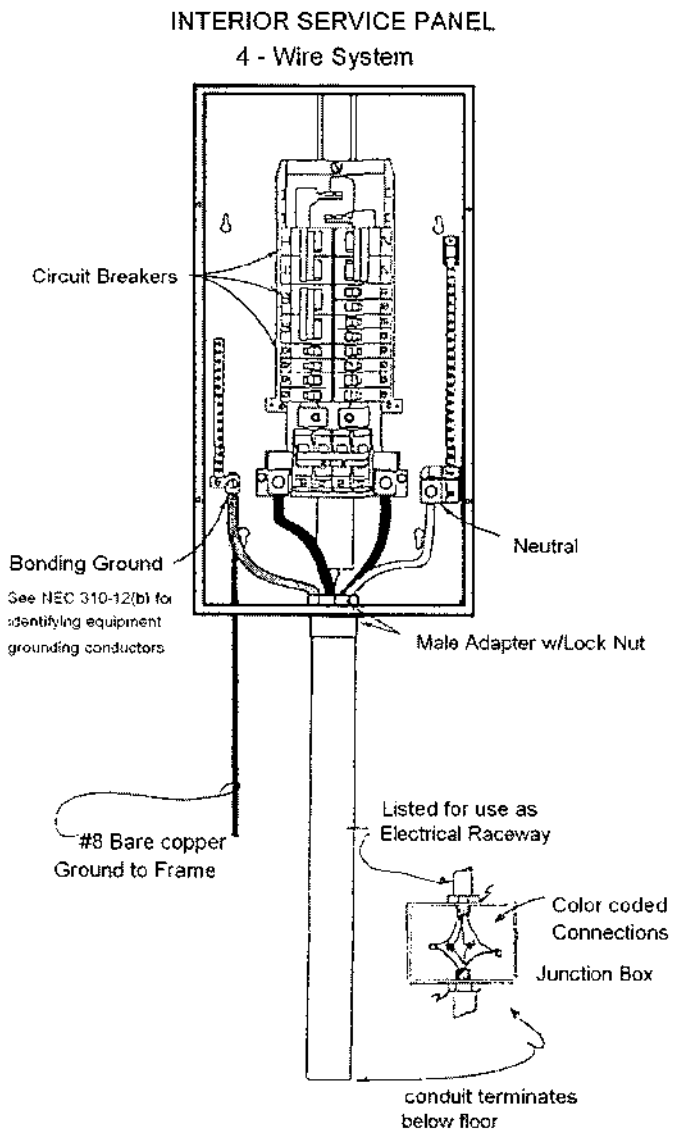
Figure: 1 TAC §354.1634(h)(3)

	Second Demonstration Year	Third Demonstration Year	Fourth Demonstration Year	Fifth Demonstration Year
Category 1 and Category 2	95 - 100%	No more than 90%	No more than 90%	No more than 80%
Category 3	0 - 5%	At least 10%	At least 10%	At least 20%

Figure: 10 TAC §23.31(j)

AMFI	Form of Assistance
<30 percent AMFI	zero percent interest, 5-year deferred, forgivable loan, or grant agreement.
>30 percent and 50 percent AMFI	zero percent interest, 10-year deferred, forgivable loan, or grant agreement.
>50 percent and 60 percent AMFI	zero percent interest, 15-year deferred, forgivable loan, or grant agreement.
>60 percent and 80 percent AMFI	zero percent interest, 15-year affordability period, 30-year term repayable loan term

Figure: 10 TAC §80.25(j)(5)



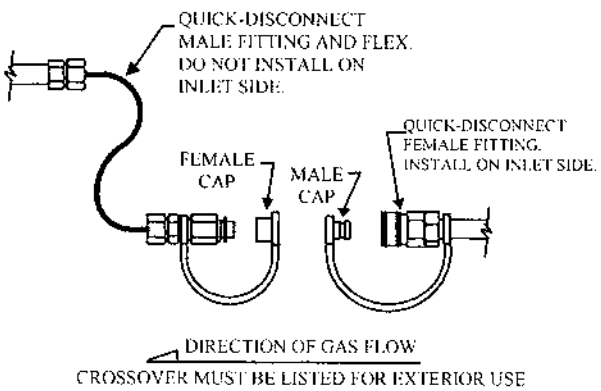
MAIN PANEL BOX FEEDER CONDUCTOR SIZES

Main Breaker size (amps)	Raceway diameter	Red/Black (power)	White (neutral)	Green (grounding)
50	1	#6	#6	#8
100	1 1/4	#2 or #3	#2 or #3	#6
150	1 ½	#1/0 or #2/0	#2	#6
200	2	#3/0	#2	#6

Figure: 10 TAC §80.25(k)(3)

FUEL GAS PIPE CROSSOVER CONNECTIONS

Method A



Method B

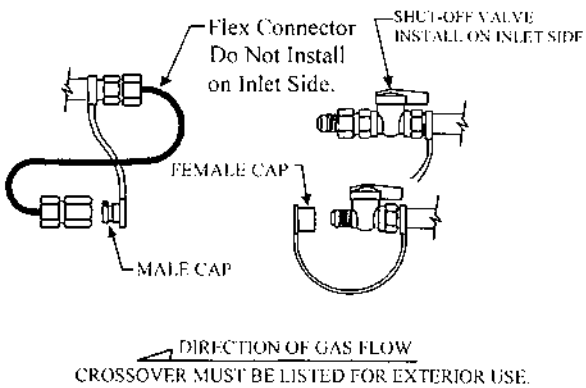


Figure: 16 TAC §311.5(d)

Type of License	1 Year Fee	2 Year Fee	3 Year Fee
Adoption Program Personnel	$25		
Announcer	$35		
Apprentice Jockey	$75		
Assistant Farrier/Plater/Blacksmith	$25		
Assistant Starter	$25		
Assistant Trainer	$100		
Assistant Trainer/Owner	$100		
Association Assistant Management	$50		
Association Management Personnel	$75		
Association Officer/Director	$100		
Association Other	$75		
Association Staff	$35		
Association Veterinarian	$75		
Authorized Agent	$15		
Chaplain	$25		
Chaplain Assistant	$25		
Exercise Rider	$25		
Farrier/Plater/Blacksmith	$75		
Groom/Hot Walker	$25		
Jockey	$100	$200	$300
Jockey Agent	$100		
Kennel	$75		
Kennel Helper	$25		
Kennel Owner	$100	$200	$300
Kennel Owner/Owner	$100	$200	$300
Kennel Owner/Owner-Trainer	$100	$200	$300
Kennel Owner/Trainer	$100	$200	$300
Lead-Out	$25		
Maintenance	$35		
Medical Staff	$35		
Miscellaneous	$25		
Multiple Owner	$35	$70	**$105** [~~$100~~]
Mutuel Clerk	$35		

Mutuel Other	$35		
Owner	$100	$200	$300
Owner-Trainer	$100	$200	$300
Pony Person	$25		
Racing Industry Representative	$100		
Racing Industry Staff	$30		
Racing Official	$50		
Security Officer	$30		
Stable Foreman	$50		
Tattooer	$100		
Test Technician	$25		
Tooth Floater	$100		
Trainer	$100	$200	$300
Training Facility Employee	$30		
Training Facility General Manager	$50		
Valet	$25		
Vendor Concessionaire	$100		
Vendor/Concessionaire Employee	$30		
Vendor Totalisator	$500		
Vendor/Totalisator Employee	$50		
Veterinarian	$100	$200	$300
Veterinarian Assistant	$30		

Figure: 40 TAC §807.353(e)

Violation	First Offense: Penalty	Repeat Offenses: Penalty
Small school transitioning to a large school: • Failure to notify Agency of the school's status change; • Failure to timely apply; or • Failure to remit increased fees.	$250	Second Offense: $500 Third and Subsequent Offenses: $1,000
Failure to disclose tuition, fees, or other charges, including increases, to the Agency	$250	Second Offense: $500 Third and Subsequent Offenses: $1,000
Vacating the school facility without providing prior notification to the Agency of a change of address	$250	Second Offense: $500 Third and Subsequent Offenses: $1,000
Failure to maintain records demonstrating compliance with requirements of statute or rule	$250	Second Offense: $500 Third and Subsequent Offenses: $1,000
Failure to provide complete and accurate information as required by the Agency	$250	Second Offense: $500 Third and Subsequent Offenses: $1,000
Failure to ensure a staff member has [~~representatives have~~] taken required training approved by the Agency	$500	Second and Subsequent Offenses: $1,000
Failure to provide an instructor [~~instructors~~] who meets [~~meet~~] necessary qualifications and whose application was submitted within required time frames [~~notice requirements~~]	$500	Second and Subsequent Offenses: $1,000
Failure to make arrangements satisfactory to the Agency for the completion of a discontinued course of instruction	$500	Second and Subsequent Offenses: $1,000
Failure to respond to a request [~~requests~~] or direction from the Agency	$500	Second and Subsequent Offenses: $1,000
Making a false statement in an application to the Agency	$500	Second and Subsequent Offenses: $1,000
Failure to maintain the instructors, facilities, equipment, or courses of instruction and outcomes on the basis of which approval was issued	$500	Second and Subsequent Offenses: $1,000

Failure to disclose limitations on transferability of courses of instruction to a prospective student	$500	Second and Subsequent Offenses: $1,000
Advertising that [~~the availability of~~] financial aid is available or advertising that financial aid may be available for a program for which it is not available	$500	Second and Subsequent Offenses: $1,000
Failure to establish that a student [~~students~~] met the approved admission requirements when the student was enrolled	$750	Second and Subsequent Offenses: $1,000
Failure to submit the annual program completion, job placement, and employment data required by the Agency by the required due date	$750	Second and Subsequent Offenses: $1,000
Failure to submit annual financial statements no later than 180 days from the close of the school's or college's fiscal year	$750	Second and Subsequent Offenses: $1,000
Transfer of all students from one school location to another school location, by an owner with multiple school locations, without Agency approval	$750	Second and Subsequent Offenses: $1,000
Dismissal [~~Suspension of all classes and dismissal~~] of all students contrary to the school's class schedule as printed in the school catalog for reasons not approved by the Agency	$750	Second and Subsequent Offenses: $1,000
Operating a school without a certificate of approval	$1,000	Second and Subsequent Offenses: $1,000
Teaching a course of instruction or revised course of instruction that has not been approved by the Agency	$1,000	Second and Subsequent Offenses: $1,000
Using advertising that is false, misleading, or deceptive, including the misrepresentation of degrees other than those approved by the Coordinating Board	$1,000	Second and Subsequent Offenses: $1,000
Failure to notify the Agency of the discontinuance of the course of instruction or the operation of a school or college within 72 hours of cessation of classes, and to make available accurate records as required	$1,000	Second and Subsequent Offenses: $1,000
Solicitation of a prospective student [~~students~~] in violation of statutory and rule requirements	$1,000	Second and Subsequent Offenses: $1,000
Any misrepresentation [~~Misrepresentation~~]	$1,000	Second and Subsequent Offenses: $1,000

Failure to file a complete application for renewal at least 30 days before the expiration date of the certificate of approval	10% of renewal fee not less than $200 and not more than $1,000	Second and Subsequent Offenses: 10% of renewal fee, not less than $200 and not more than $1,000
Failure to pay any fee or penalty installment by the required due date	50% of the total amount of the fee	50% of the total amount of the fee
Paying a refund [~~refunds~~] late	A rate established annually by the Commission	A rate established annually by the Commission.

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Office of the Attorney General

Notice of Public Hearing Regarding Proposed Amended Rules

The Office of the Attorney General will conduct a public hearing to receive comments regarding proposed amendments to 1 TAC §55.552 and §55.556, Subchapter L, concerning Financial Institution Data Matches, and 1 TAC §§55.601 - 55.605, Subchapter M, concerning Intercept of Insurance Claims.

The hearing will be held in compliance with Texas Government Code §2001.029 and is scheduled for November 5, 2012, from 1:00 p.m. until 3:00 p.m., in room 344 of the Office of the Attorney General, 5500 E. Oltorf, Austin, Texas.

Any interested person may appear and offer comments or statements, either orally or in writing. Organizations, associations, or groups are encouraged to present their commonly held views or similar comments through a representative member where possible.

Persons requiring special accommodations or auxiliary aids or services who plan on attending this hearing should contact Tashia Coleman at tashia.coleman@texasattorneygeneral.gov. Requests should be made as far in advance as possible so that appropriate arrangements can be made.

TRD-201205381
Katherine Cary
General Counsel
Office of the Attorney General
Filed: October 16, 2012

♦ ♦ ♦

Comptroller of Public Accounts

Notice of Legal Banking Holidays

Texas Tax Code §111.053(b) requires that, before January 1 of each year, the Texas Comptroller of Public Accounts publish a list of the legal holidays for banking purposes for that year. This is the 2013 Eleventh District Holiday Schedule. Pursuant to the Federal Reserve Bank of Dallas Notice 12-44 dated September 18, 2012, the Federal Reserve Bank of Dallas and its branches at El Paso, Houston, and San Antonio, Texas, will be closed on the following holidays in 2013:

Tuesday, January 1, New Year's Day

Monday, January 21, Martin Luther King Jr. Day

Monday, February 18, Presidents Day

Monday, May 27, Memorial Day

Thursday, July 4, Independence Day

Monday, September 2, Labor Day

Monday, October 14, Columbus Day

Monday, November 11, Veterans Day

Thursday, November 28, Thanksgiving Day

Wednesday, December 25, Christmas Day

The Federal Reserve standard holiday schedule mandates that if January 1, July 4, November 11, or December 25 fall on a Sunday, the following Monday will be observed as a holiday. If January 1, July 4, November 11, or December 25 occur on a Saturday, the preceding Friday will not be observed as a holiday.

For 2013, none of these dates fall on a Saturday or Sunday.

TRD-201205391
Jette Withers
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: October 16, 2012

♦ ♦ ♦

Notice of Loan Fund Availability and Request for Applications

Pursuant to: (1) the LoanSTAR (Saving Taxes and Resources) Revolving Loan Program of the Texas State Energy Plan (SEP) in accordance with the Energy Policy and Conservation Act (42 U.S.C. 6321, et seq.), as amended by the Energy Conservation and Production Act (42 U.S.C. 6326, et seq.); (2) the Oil Overcharge Restitutionary Act, Chapter 2305 of the Texas Government Code; and (3) Texas Administrative Code, Title 34, Chapter 19, Subchapter D, Loan Program for Energy Retrofits; the Texas Comptroller of Public Accounts (Comptroller) and the State Energy Conservation Office (SECO) announce its Notice of Loan Fund Availability (NOLFA) and Request for Applications (RFA #BE-G7-2012) and invite applications from eligible interested governmental entities for loan assistance to perform building energy efficiency and retrofit activities.

PROGRAM SUMMARY: The Texas LoanSTAR Revolving Loan Program finances energy-related cost-reduction retrofits for eligible public sector institutions. Low interest rate loans are provided to assist those institutions in financing their energy-related cost-reduction efforts. The program's revolving loan mechanism allows loan recipients to repay loans through the stream of energy cost savings realized from the projects.

FUNDS AVAILABLE AND LOAN TERM: Approximately $43,600,000 in LoanSTAR funds may be available in the form of the building efficiency and retrofit revolving loan funds. The anticipated maximum amount of funds available for each loan recipient is $7,500,000. SECO may make more than one award of a loan and may make more than one award of a loan to a single loan recipient with this NOLFA/RFA announcement. The interest rate to be charged to loan recipients for this NOLFA/RFA announcement is 2.0% fixed. The loan term will be equal to the composite simple payback term for the energy efficiency measures.

ELIGIBILITY CRITERIA: Eligible public sector institutions include the following: (1) any state department, commission, board, office, institution, facility, or other agency; (2) a public junior college or community college; (3) an institution of higher education as defined in §61.003 of the Texas Education Code; (4) units of local government including a county, city, town, a public or non-profit hospital or health care facility; (5) a public school; or (6) a political subdivision of the state.

Utility dollar savings are the most important criterion for determining if the measure can be considered an eligible Energy Cost Reduction Measure (ECRM). ECRMs are not limited to those activities that save units of energy. An ECRM could conceivably call for actions which save no energy or consume additional BTUs, but save utility budget dollars. Examples of such ECRMs include demand reduction, increased power factor, load shifting, switching utility rate structures, and thermal storage projects.

Projects financed by LoanSTAR must have a composite simple payback of ten (10) years or less. In addition, each ECRM and Utility Cost Reduction Measure (UCRM) must have a simple payback that does not exceed the estimated useful life (EUL) of the ECRM or UCRM. Loan recipients have the option of buying down specific energy-related cost-reduction projects so that paybacks can meet both the individual and composite loan term limits. SECO encourages Applicants to consider renewable energy technologies when evaluating ECRMs and UCRMs.

Before entering into a LoanSTAR loan agreement, Applicants are required to submit an Energy Assessment Report (EAR) for Design-Bid-Build Projects and Design-Build Projects, or a Utility Assessment Report (UAR) for Energy Savings Performance Contracts, or a Systems Commissioning Report in the case where the commissioning meets LoanSTAR payback requirements. All LoanSTAR projects must be reviewed and analyzed by a professional engineer licensed in the State of Texas (Engineer). The Engineer shall be selected by the Applicant.

When an Engineer analyzes a project; he/she shall submit the details of his/her analysis in the form of an EAR for Design-Bid-Build Projects and Design-Build Projects, or a UAR for Energy Savings Performance Contracts. The EAR shall be prepared in accordance with the LoanSTAR Technical Guidelines (http://www.seco.cpa.state.tx.us/ls/ls_guideline.php) prescribed format. The UAR shall be prepared in accordance with the SECO Performance Contracting Guidelines (http://seco.cpa.state.tx.us/perf_contract.php) prescribed format. There is not a prescribed format for Systems Commissioning Reports.

Project descriptions and calculations contained within the EAR, the UAR, and the Systems Commissioning Reports must be reviewed and approved by SECO before project financing is authorized.

Project designs for Design-Bid-Build must be reviewed and approved by SECO before construction can commence. Design-Build project designs must be sufficiently complete to be reviewed and approved by SECO before construction can commence. Design-Bid-Build, Design-Build, and Energy Savings Performance Contracts are monitored during the construction phase and at project completion.

Post-retrofit energy savings should be monitored by the Applicant in Design-Bid-Build and Design-Build projects to ensure that energy cost savings are being realized. The level of monitoring may range from utility bill analysis to individual system or whole building metering, depending on the size and types of retrofits installed.

For Energy Savings Performance Contracts, a Measurement and Verification (M+V) plan must be developed and approved by SECO. Post construction measurement and verification costs must be included as part of the total project cost when calculating the payback.

Additional LoanSTAR funds can be borrowed for metering of large, complex retrofits in order to maximize the probability of achieving, or exceeding, calculated savings; however, the maximum allowable loan amount, including the cost of the metering, cannot be exceeded.

APPLICATION REQUIREMENTS: Comptroller will make the loan application, instructions, and a sample loan agreement with attachments available for review electronically on the SECO website at: http://www.seco.cpa.state.tx.us/funding/ after 10:00 a.m. CT on Friday, October 26, 2012.

The loan application must: (1) be complete; (2) be submitted under a signed transmittal letter; (3) include an executive summary and a table of contents; and (4) describe the project and personnel qualifications relevant to the evaluation criteria. Applications must also meet the following program requirements:

- The maximum loan amount shall not exceed $7.5 million.

- The interest rate is set at 2.0%.

- The term of the loan is equal to the composite simple payback term for the energy efficiency measures, which must be 10 years or less. The individual ECRM/UCRM must demonstrate a simple payback of less than the ECRM's/UCRM's estimated useful life.

- Project expenses will be reimbursed on a "cost reimbursement" basis.

- Loan recipient will be required to comply with federal Solid Waste Disposal Act, and, if applicable, National Environmental Policy Act, and National Historic Preservation Act. Loan recipients will ensure that the State Historical Preservation Office (SHPO) is consulted in any project award that may include a building or site of historical importance. In this regard, SHPO guidance will be solicited and followed to ensure that the historical significance of the building will be preserved. All requirements are set out in the sample contract.

- SECO will conduct periodic on-site monitoring visits on all building retrofit projects.

- All improvements financed through the LoanSTAR Revolving Loan Program shall meet minimum efficiency standards (as prescribed by applicable building energy codes). Examples of projects that are acceptable may include:

- Building and mechanical system commissioning and optimization

- Energy management systems and equipment control automation

- High efficiency heating, ventilation and air conditioning systems, boilers, heat pumps and other heating and air conditioning projects

- High efficiency lighting fixtures and lamps

- Building Shell Improvements (insulation, adding reflective window film, radiant barriers, and cool roof).

- Load Management Projects

- Energy Recovery Systems

- Low flow plumbing fixtures, high efficiency pumps

- Systems commissioning

- Renewable energy efficiency projects are strongly encouraged wherever feasible, and may include installation of distributed technology such as rooftop solar water and space heating systems, geothermal heat pumps(only closed loop systems with no greater than 10 ton capacity), or electric generation with photovoltaic or small wind and solar-thermal systems. If there are closed-loop geothermal heat pumps greater than 10 ton capacity involved, then Applicants will be responsible for further National Environmental Policy Act (NEPA) review by DOE in the event of an award. If renewable generation greater than 20 KW is involved, Applicants will be responsible for further NEPA review by DOE.

Applicants shall submit one (1) original, five (5) bound copies, and one (1) electronic copy of the loan application, as well as of one of the following documents:

1. Project Assessment Commitment. The Project Assessment Commitment can be used for Design-Bid-Build and Design-Build projects, for Energy Savings Performance Contracts, or for Commissioning projects. The Project Assessment Commitment shall be signed by the applicant's Chief Financial Officer or equivalent;

2. Preliminary Energy Assessment (PEA). A PEA can be used for Design-Bid-Build and Design-Build projects, for Energy Savings Performance Contracts, or for Commissioning projects. The PEA must be completed by a Professional Engineer licensed in the State of Texas. PEAs must include Energy Cost Reduction Measure (ECRM) or Utility Cost Reduction Measure (UCRM) that will be completed to reduce utility (energy and water) costs. Project costs and simple paybacks must also be documented for each ECRM and UCRM in the PEA;

3. Energy Assessment Report (EAR). An EAR can be used for Design-Bid-Build and Design-Build projects;

4. Utility Assessment Report (UAR). The UAR can be used for Energy Savings Performance Contracts; or

5. Commissioning Report for Commissioning projects.

While the Project Assessment Commitment and the PEA will qualify the project for potential funding, an approved EAR, UAR or Commissioning Report will be required prior to execution of a loan agreement.

ISSUING OFFICE: Parties interested in submitting an application should contact Jason C. Frizzell, Assistant General Counsel, Contracts, Texas Comptroller of Public Accounts, at: 111 E. 17th St., Room 201, Austin, Texas 78774, or via phone at (512) 305-8673. This NOLFA/RFA will be available on Friday, October 26, 2012, after 10:00 a.m. Central Time (CT) and during normal business hours thereafter.

QUESTIONS: All written inquiries and questions must be received at the above-referenced address not later than 2:00 p.m. (CT) on November 2, 2012. Prospective applicants are encouraged to send Questions via email to contracts@cpa.states.tx.us or fax to (512) 463-3669 to ensure timely receipt. On or about November 9, 2012, or as soon thereafter as practical, Comptroller expects to post responses to the questions received by the deadline on the website referenced above. Late Questions will not be considered under any circumstances.

CLOSING DATE: Applications must be delivered in the Issuing Office to the attention of the Assistant General Counsel, Contracts, no later than 2:00 p.m. (CT), on December 7, 2012. Late Applications will not be considered under any circumstances. Applicants shall be solely responsible for verifying timely receipt of applications in the Issuing Office.

EVALUATION CRITERIA: Loan Applications will be evaluated under the general criteria outlined in the application and instructions. Comptroller reserves the right to accept or reject any or all applications submitted. Comptroller is not obligated to execute a loan agreement on the basis of this NOLFA/RFA. Comptroller shall not pay for any costs incurred by any entity in responding to this NOLFA/RFA. Comptroller and SECO may request additional information at any time if deemed necessary for further evaluation.

A Loan Application, submitted through a NOLFA/RFA process, must be reviewed by the SECO legal counsel before a loan can be considered. Applications that meet minimum qualifications are distributed to the members of the Evaluation Committee for their independent review and evaluation. The Evaluation Committee will review and individually score each written application. The Evaluation Committee has the option of selecting the top scoring applications and may, but is not required to, call the top scoring Applicants to come to SECO offices in Austin, Texas for an interview. The Evaluation Committee may, in its sole discretion, proceed directly to Applicant scoring and selection without the necessity of any oral interviews.

Applicants who submit a project assessment commitment or a PEA will receive a Memorandum of Understanding (MOU) from SECO. The sole purpose of the MOU is to reserve LoanSTAR funds for the successful Applicant during the period the EAR, UAR, or Commissioning Report is being prepared. This document should not be construed as a loan approval and does not authorize the expenditure of funds for LoanSTAR projects. LoanSTAR project expenditures cannot be incurred before the effective date cited in a fully-executed loan agreement unless those expenditures are approved in the LoanSTAR Technical Guidelines. Commitment of funding to applicants will take place upon execution of the MOU. Those applicants must then submit an EAR, UAR, or Commissioning Report by the date identified in the MOU.

The EAR, UAR or Commissioning Report shall be prepared by Engineer. The EAR and UAR shall be prepared in accordance with the guidelines and formats described above. A selected Applicant's CFO will also certify that three (3) original bound copies and one (1) electronic copy of the completed reports will be delivered to SECO for review within the required submittal date. The submitted EAR, UAR, or Commissioning Report will then be reviewed by the SECO technical staff or its contractor. The technical staff may request Engineer to provide additional information or calculations. If the report is not submitted within any Loan Application time constraints, SECO may, in its sole discretion, choose to withdraw the loan offer.

LOAN AGREEMENT: SECO will attempt to negotiate a Loan Agreement with any selected Applicants after the EAR, UAR, or Commissioning Report has been reviewed and approved. The reports must be deemed to comply with LoanSTAR Technical Guidelines for EARs and SECO Performance Contracting Guidelines for UARs in order to move forward with the preparation of a Loan Agreement.

A fully-executed Loan Agreement authorizes the selected Applicant to proceed with the design of their projects and includes guaranteed funding for the ECRMs stated in the approved EAR, UAR or Commissioning Report. If a Loan Agreement cannot be successfully negotiated within a reasonable period of time, negotiations will be terminated, and negotiations with the next highest ranking Applicant may commence. The process may continue until one or more Loan Agreements are signed or the loan offer is withdrawn. SECO may at any time, upon failure of negotiations, choose to reissue or withdraw the loan offer rather than continue with negotiations. If SECO decides, in its sole discretion, to award more than one loan, SECO may proceed with negotiations in the above-described manner with more than one Applicant simultaneously.

DESIGN-BID-BUILD AND DESIGN-BUILD DESIGN AND REVIEW PROCESS: After a Loan Agreement has been executed, Applicant can begin the process of designing and implementing the projects identified in the report. Applicant agrees that bidding and construction activities shall not begin until after Applicant received SECO approval that the submitted designs conform to LoanSTAR Technical Guidelines. Applicants agree to competitively select contractors or bidders as required by Texas state law.

A design-bid-build process includes two milestones.

1. Selecting a design engineer. The engineer selected to design the projects can be the Engineer who prepared the Energy Assessment Report; however, Applicant must follow competitive procedures, based upon qualifications, to select the design engineer.

2. Preparing the design documents. Applicant must submit Design Development Reports and Detailed Design Reports (Volume I, Appendix

L of the LoanSTAR Technical Guidelines) to SECO for technical review and approval. The SECO Technical Review will ensure that the design specifications match the projects identified in the report.

i. Design Development Report (50%) - This design review report will be completed when the design process is approximately 50% complete and will verify that the design is proceeding in a direction which conforms with the approved EAR.

ii. Detailed Design Review Report (100%) - This design review report will verify that the completed design conforms to the intent of the approved energy assessment. In addition, it will evaluate the proposed schedule and estimated project construction budget provided by the design engineer.

A design-build process includes two milestones.

1. Selecting a design Engineer. The engineer selected to design the projects can be the Engineer who prepared the Energy Assessment Report; however, Applicant must follow competitive procedures, based upon qualifications, to select the Engineer.

2. Preparing the design documents. Applicant must submit Design Development Reports and Detailed Design Reports (Volume I, Appendix L of the LoanSTAR Technical Guidelines) to SECO for technical review and approval. The SECO Technical Review will ensure that the design specifications match the projects identified in the report.

i. Design Development Report (50%) - This design review report will be completed when the design process is approximately 50% complete and will verify that the design is proceeding in a direction which conforms with the approved EAR.

ii. Detailed Design Review Report - This design review report will verify that the design is sufficiently complete to determine that the project conforms to the intent of the approved energy assessment. In addition, the reviewer will evaluate the proposed schedule and estimated project construction budget provided by the design engineer. Any subsequent design elements completed after this review shall be forwarded to SECO to ensure the additional design elements meet the LoanSTAR Technical Guideline requirements.

ENERGY SAVINGS PERFORMANCE CONTRACTING DESIGN REVIEW PROCESS: There is no design review process for Energy Savings Performance Contracts unless a system commissioning is a component of that program.

SYSTEMS COMMISSIONING REVIEW PROCESS: Systems commissioning may be part of a Design-Bid-Build project, a Design-Build project, an Energy Savings Performance Contracting project or it may be a stand-alone activity. To be considered as an ECRM/UCRM or a stand-alone activity, the Systems Commissioning Report must be reviewed and approved by SECO prior to loan execution.

Commissioning activities typically include surveying, interviewing, baseline measurements and analyses, definition of problems, definition of solutions, implementation of solutions, balancing, and verification measurements. Some of these steps may be repeated as necessary to optimize systems operations. In some cases system considerations extend beyond just the equipment installed under the LoanSTAR ECRMs. This is to ensure that total building system effects are comprehended and optimized. Since both heating and cooling systems are usually involved in this process, optimization activities may extend over a six-month period or longer. Documentation of findings and corrections, along with recommended operating procedures should be provided by the commissioning organization.

NOTIFICATION UPON PARTIAL AND FULL COMPLETION: Applicant agrees to promptly notify SECO in writing when the project reaches 50% completion. Upon notification, SECO shall perform a construction monitoring visit to ensure the project complies with the LoanSTAR Technical Guidelines or SECO Performance Contracting Guidelines. After the construction monitoring visit, SECO will provide Applicant with a copy of the On-Site Construction Monitoring Report. This report will provide a general overview of construction site activities and will address issues of budget, schedule, and conformance of the work with the design documents and will make recommendations concerning any necessary changes in scope or budget.

Applicant agrees to promptly notify SECO in writing when the project reaches 100% completion. Upon notification, SECO shall perform a construction monitoring visit to ensure the completed project complies with the LoanSTAR Technical Guidelines or SECO Performance Contracting Guidelines. After the construction monitoring visit, SECO will provide the Applicant with a copy of the Final Monitoring Report. This report focuses on compliance by the construction contractor with the "close-out" documentation requirements outlined in the bid documents. The report will verify that guarantees, warrantees, releases, O&M manuals, training sessions required, etc. have been provided by the contractor. Applicant shall then certify with a written letter that materials and equipment to be replaced have been properly disposed. These materials would include, but not be limited to, light bulbs, ballasts, switches, controls, HVAC equipment, refrigerants, pumps, fans, blowers, piping, valves, conduit, wiring, and boilers. Certification shall include proper disposal of hazardous materials. All waste disposals must be conducted in compliance with local, State of Texas, and federal rules and regulations. Upon completion of the project and acceptance by SECO, Applicant will submit a Final Completion Report to SECO (LoanSTAR Technical Guidelines) and a final voucher request.

REPAYMENT PROCESS: After submittal of the Final Completion Report to SECO and the final voucher request, Applicant shall request a Loan Repayment Schedule from SECO, which contains the outstanding loan balance, the term of the loan, and the schedule of quarterly payments to SECO. SECO forwards the Loan Repayment Schedule to Applicant based on the incurred loan amount. The outstanding loan balance consists of the borrowed dollars plus the interest accrued on the borrowed dollars. Interest begins accruing on the borrowed dollars when Applicant receives that money. The interest continues to accrue until the date of the first scheduled loan repayment. The term of the loan is equal to the simple project payback that was provided in the EAR, UAR, or Commissioning Report. The term is determined by dividing the total project borrowed amount by the annual energy cost savings projected in the EAR, UAR or Commissioning Report. The schedule of quarterly payments will contain equal payments. Loan repayments will begin within sixty (60) days of project completion. The payments are due at the end of each fiscal quarter, using the State's fiscal calendar. Payments are due regardless of whether Applicant has achieved that level of energy savings and do not vary according to the actual energy savings.

SCHEDULE OF EVENTS: The anticipated schedule of events pertaining to this RFA is as follows: Issuance of RFA - October 26, 2012, after 10:00 a.m. CT; Questions Due - November 2, 2012, 2:00 p.m. CT; Official Responses to Questions posted - November 9, 2012, or as soon thereafter as practical; Applications Due - December 7, 2012, 2:00 p.m. CT; Loan Agreement Execution - as soon as practical.

TRD-201205397
Jason C. Frizzell
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: October 17, 2012

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.009, and 304.003, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/22/12 - 10/28/12 is 18% for Consumer[1]/Agricultural/Commercial[2] credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/22/12 - 10/28/12 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 11/01/12 - 11/30/12 is 5.00% for Consumer/Agricultural/Commercial credit through $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 11/01/12 - 11/30/12 is 5.00% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-201205382
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: October 16, 2012

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Credit Union Department

Application to Amend Articles of Incorporation

Notice is given that the following application has been filed with the Credit Union Department (Department) and is under consideration:

An application for a name change was received from Midland Teachers Credit Union, Midland, Texas. The credit union is proposing to change its name to MTCU.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-201205399
Harold E. Feeney
Commissioner
Credit Union Department
Filed: October 17, 2012

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Application to Expand Field of Membership

Notice is given that the following application has been filed with the Credit Union Department (Department) and is under consideration:

An application was received from Linkage Credit Union, Waco, Texas, to expand its field of membership. The proposal would permit persons who work, reside, worship, or attend school in McLennan County, Texas, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236 or downloading the form at http://www.cud.texas.gov/page/bylaw-charter-applications. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-201205400
Harold E. Feeney
Commissioner
Credit Union Department
Filed: October 17, 2012

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Notice of Final Action Taken

In accordance with the provisions of 7 TAC §91.103, the Credit Union Department provides notice of the final action taken on the following applications:

Applications to Expand Field of Membership - Approved

Del Rio SP Credit Union, Del Rio, Texas - See *Texas Register* issue, dated August 31, 2012.

Application for a Merger or Consolidation - Approved

Norman Mathis Credit Union (Houston) and United Community Credit Union (Galena Park) - See *Texas Register* issue, dated June 29, 2012.

TRD-201205401
Harold E. Feeney
Commissioner
Credit Union Department
Filed: October 17, 2012

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Commission on State Emergency Communications

Notice Concluding Annual Review of 1 TAC §255.4

The Commission on State Emergency Communications (CSEC) published notice of its annual review of the definition in 1 TAC §255.4 of "local exchange access line" and "equivalent local exchange access line," in the August 17, 2012, issue of the *Texas Register* (37 TexReg 6346). CSEC's annual review is required by Texas Health and Safety Code §771.063(c).

No comments were received regarding CSEC's notice of annual review.

CSEC has determined not to propose amendments to the definitions in 1 TAC §255.4 and to leave in effect the rule as adopted in October 2007.

This concludes CSEC's annual review of 1 TAC §255.4.

TRD-201205291
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Filed: October 10, 2012

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Employees Retirement System of Texas

Request for Proposal

This Notice takes place of the previous Notice published in the October 5, 2012, issue of the *Texas Register* (37 TexReg 8065), TRD-201205094.

In accordance with Texas Insurance Code, Chapter 1551, the Employees Retirement System of Texas ("ERS") is issuing a Request for Proposal ("RFP") seeking qualified third-party administrators ("TPA") and/or insurance carriers to provide administrative services for the self-funded Short-Term Disability Income Disability Income Benefits ("STD") Plan and administrative or insurance services for the Long-Term Disability ("LTD") Income Benefits Plan for Participants covered under the Texas Employees Group Benefits Program ("GBP") beginning September 1, 2013, through an initial term of August 31, 2017. The TPA shall provide administrative services for the level of benefits required in the RFP and meet other requirements that are in the best interest of ERS, the GBP, its Participants and the state of Texas, and shall be required to execute a Contractual Agreement ("Contract") provided by, and satisfactory to, ERS.

The TPA must offer a proposal for both the STD and LTD plans. The TPA shall offer a proposal for the STD services described in the RFP on a self-funded basis. The TPA shall offer a proposal on the LTD services for: (1) Administrative Services Only and/or (2) Fully Insured.

A TPA wishing to respond to this request shall (1) Maintain its principal place of business and provide all products and/or services including, but not limited to: call center, billing, eligibility, and programming, etc., within the United States of America, and shall have a valid Certificate of Authority and a third-party administrative license to do business in Texas as a TPA from the Texas Department of Insurance ("TDI") and be in good standing with all agencies of the state of Texas, including TDI; (2) Have been providing coverage, administrative services, and claim processing to group benefit plans, at least one of which will have an enrollment of 10,000 covered employees working in multiple locations; and (3) The TPA shall have a minimum capital and surplus in the amount of $50 million and have been doing business in Texas for three (3) years as evidenced by a 2010 audited financial statement.

The RFP will be available on or after October 11, 2012, from the ERS website and will include documents for the TPA's review and response. To access the secured portion of the RFP website, the interested TPA shall email its request to the attention of iVendor Mailbox at: **ivendorquestions@ers.state.tx.us.** The email request shall reflect the following: TPA's legal name, point of contact's full name, street address; phone and fax numbers; and email address for the organization's direct point of contact. Upon receipt of this information, a user ID and password will be issued to the requesting organization that will permit access to the secured RFP.

General questions concerning the RFP and/or ancillary bid materials should be sent to the iVendor Mailbox where the responses, if applicable, are updated frequently. The submission deadline for all RFP questions submitted to the iVendor Mailbox are due on October 26, 2012, at 4:00 p.m. (CT).

To be eligible for consideration, the TPA is required to submit a total of seven (7) sets of the Proposal in a sealed container. One (1) printed original shall be labeled as an "Original" and include fully executed documents, as appropriate, **signed in blue ink** and without amendment or revision. Three (3) additional printed copies labeled "copy" of the Proposal, including all required exhibits, shall be provided in printed format. Finally, two (2) complete copies of the entire Response shall be submitted on CD-ROMs in Excel or Word format. No PDF documents (with the exception of sample GBP-specific marketing materials, financial statements, and audited financial materials) may be reflected on the CD-ROMs. All materials shall be received by ERS no later than 12:00 Noon (CT) on November 21, 2012.

ERS will base its evaluation and selection of a TPA on factors including, but not limited to, the following, which are not necessarily listed in order of priority: compliance with the RFP, operating requirements, experience serving large group programs, past experience, administrative quality, program fees, and other relevant criteria. Each Proposal will be evaluated both individually and relative to the Proposal of other qualified TPAs. Complete specifications will be included with the RFP.

ERS reserves the right to reject any and/or all Proposals and/or call for new Proposals if deemed by ERS to be in the best interests of ERS, the GBP, its Participants, and the state of Texas. ERS also reserves the right to reject any Proposal submitted that does not fully comply with the RFP's instructions and criteria. ERS is under no legal requirement to execute a Contract on the basis of this notice or upon issuance of the RFP and will not pay any costs incurred by any entity in responding to this notice or in connection with the preparation thereof. ERS reserves the right to vary all provisions set forth at any time prior to execution of a Contract where ERS deems it to be in the best interest of ERS, the GBP, its Participants and the state of Texas.

TRD-201205319
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Filed: October 11, 2012

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ, agency or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is November 26, 2012. TWC, §7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be received by 5:00 p.m. on November 26, 2012. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: Aaina Enterprises, Incorporated dba Nu-Texas Truck Stop; DOCKET NUMBER: 2012-0737-PST-E; IDENTIFIER:

RN101820918; LOCATION: Jacksonville, Cherokee County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $5,000; ENFORCEMENT COORDINATOR: David Carney, (512) 239-2583; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(2) COMPANY: Allgood Construction Company, Incorporated; DOCKET NUMBER: 2012-1871-WQ-E; IDENTIFIER: RN106477672; LOCATION: Pearland, Brazoria County; TYPE OF FACILITY: commercial construction; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a Construction General Permit (stormwater); PENALTY: $875; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: ALPHA OMEGA RECYCLING, INCORPORATED; DOCKET NUMBER: 2011-1015-IHW-E; IDENTIFIER: RN100657543; LOCATION: White Oak, Gregg County; TYPE OF FACILITY: metal bearing waste processing; RULE VIOLATED: 30 TAC §335.2(b) and §335.63(b), 40 Code of Federal Regulations (CFR) §262.12(c) and Hazardous Waste Permit Number 50203, Provision Number II.C.1.h., by failing to prevent the shipment of industrial solid and hazardous waste to an unauthorized facility; and 30 TAC §335.10(a) and 40 CFR §262.20(a), by failing to prepare a manifest for off-site shipments of hazardous waste; PENALTY: $18,750; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(4) COMPANY: Ash Grove Texas LP; DOCKET NUMBER: 2012-1872-WQ-E; IDENTIFIER: RN105433692; LOCATION: Denton, Denton County; TYPE OF FACILITY: cement mixing plant; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a Multi-Sector General Permit (stormwater); PENALTY: $875; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: B-S CARTAGE, INCORPORATED dba J-V Dirt and Loam; DOCKET NUMBER: 2012-0898-MSW-E; IDENTIFIER: RN101495976; LOCATION: Austin, Travis County; TYPE OF FACILITY: composting; RULE VIOLATED: 30 TAC §332.4(3), by failing to prevent the discharge of material to or the pollution of surface water or groundwater as a result of the beneficial use or reuse and recycling of material; 30 TAC §328.4(b) and §332.23(5), by failing to meet the recycling rates relating to limitations on storage of recyclable materials; 30 TAC §328.5(b)(4) and §332.23(5), by failing to report any updates or changes to information contained in the site report within 90 days of the effective date of the change; and 30 TAC §§328.5(d), 332.23(5), and 37.901, by failing to establish and maintain financial assurance for the closure of a recycling facility that stores combustible material outdoors; PENALTY: $11,780; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 12100 Park 35 Circle, Austin, Texas 78753, (512) 339-2929.

(6) COMPANY: City of Celina; DOCKET NUMBER: 2011-1643-MWD-E; IDENTIFIER: RN102336567; LOCATION: Celina, Collin County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0014246001, Interim I Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limits; PENALTY: $26,030; Supplemental Environmental Project offset amount of $26,030 applied to Removal and Disposal of Silt, Grease and Waste Solids; ENFORCEMENT COORDINATOR: Heather Brister, (254) 761-3034; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: City of Collinsville; DOCKET NUMBER: 2012-1044-MWD-E; IDENTIFIER: RN101919959; LOCATION: Collinsville, Grayson County; TYPE OF FACILITY: domestic wastewater treatment plant; RULE VIOLATED: TWC, §26.121(a), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0010151001, Interim Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limits; PENALTY: $3,310; ENFORCEMENT COORDINATOR: Jeremy Escobar, (361) 825-3422; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(8) COMPANY: City of Lawn; DOCKET NUMBER: 2012-1075-PWS-E; IDENTIFIER: RN101406916; LOCATION: Lawn, Taylor County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(2)(G) and Texas Health and Safety Code, §341.0315(c), by failing to provide an elevated storage capacity of 100 gallons per connection or a pressure tank capacity of 20 gallons per connection; PENALTY: $249; ENFORCEMENT COORDINATOR: Jim Fisher, (512) 239-2537; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(9) COMPANY: City of Petrolia; DOCKET NUMBER: 2012-1235-PWS-E; IDENTIFIER: RN102677937; LOCATION: Petrolia, Clay County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level of 0.080 milligrams per liter for total trihalomethanes based on the running annual average; PENALTY: $410; ENFORCEMENT COORDINATOR: Jim Fisher, (512) 239-2537; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(10) COMPANY: City of Shenandoah; DOCKET NUMBER: 2012-1213-MWD-E; IDENTIFIER: RN101916195; LOCATION: Shenandoah, Montgomery County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0012212002, Interim Effluent Limitations and Monitoring Requirements Numbers 1 and 6, by failing to comply with permitted effluent limitations; PENALTY: $16,900; ENFORCEMENT COORDINATOR: Jacquelyn Green, (512) 239-2587; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: DALLAS FRONTIER PETRO, INCORPORATED dba Corporate Mart; DOCKET NUMBER: 2012-1227-PST-E; IDENTIFIER: RN102647484; LOCATION: Lewisville, Denton County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(a) and (c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and by failing to provide release detection for the piping associated with the UST system; PENALTY: $3,581; ENFORCEMENT COORDINATOR: Jorge Ibarra, P.E., (817) 588-5890; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(12) COMPANY: Debbie Block and Melvin Block dba Cherry Hill Water System; DOCKET NUMBER: 2012-0941-PWS-E; IDENTIFIER: RN101179844; LOCATION: Bridge City, Orange County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30

TAC §290.109(c)(2)(A)(ii) and §290.122(c)(2)(B), and Texas Health and Safety Code, §341.033(d), by failing to collect routine distribution water samples for coliform analysis for the months of July and October 2011 and by failing to provide public notice of the failure to sample for the month of October 2011; 30 TAC §290.106(e) and §290.113(e), by failing to report the results of annual nitrate/nitrite and Stage 1 Disinfectant By-products monitoring to the executive director; 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a Disinfectant Level Quarterly Operating Report to the executive director each quarter by the tenth day of the month following the end of the quarter; 30 TAC §290.109(c)(3)(A)(ii), by failing to collect a set of repeat distribution coliform samples within 24 hours of being notified of a total coliform-positive result on a routine sample for the month of December 2011; and 30 TAC §290.109(c)(4)(C), by failing to notify the wholesale system(s) within 24 hours of being notified of a coliform-positive distribution sample; PENALTY: $2,078; ENFORCEMENT COORDINATOR: Andrea Linson, (512) 239-1482; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(13) COMPANY: DZ Beechnut, LP dba Chevron; DOCKET NUMBER: 2012-0842-PST-E; IDENTIFIER: RN102789542; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED; 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring); and 30 TAC §334.10(b)(1)(B), by failing to maintain all UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $6,750; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(14) COMPANY: Howard Hurst; DOCKET NUMBER: 2012-1097-MSW-E; IDENTIFIER: RN104041850; LOCATION: Brady, McCulloch County; TYPE OF FACILITY: unauthorized disposal site; RULE VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste; PENALTY: $1,187; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (325) 655-9479.

(15) COMPANY: Itasca Landfill TX, LP; DOCKET NUMBER: 2012-1140-IHW-E; IDENTIFIER: RN100213412; LOCATION: Itasca, Hill County; TYPE OF FACILITY: Type I landfill; RULE VIOLATED: 30 TAC §335.2(b), by failing to prevent the disposal of industrial hazardous waste at an unauthorized facility; and 30 TAC §335.2(b), by failing to prevent the disposal of prohibited waste; PENALTY: $5,200; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(16) COMPANY: Jack Haston Holt dba La Cabana Mexican Restaurant; DOCKET NUMBER: 2012-1027-PWS-E; IDENTIFIER: RN101220242; LOCATION: Spicewood, Travis County; TYPE OF FACILITY: restaurant with a public water supply; RULE VIOLATED: 30 TAC §290.109(c)(3)(A)(ii), by failing to collect a set of repeat distribution coliform samples within 24 hours of being notified of a total coliform-positive result on a routine sample; and 30 TAC §290.109(c)(2)(F), by failing to collect at least five routine distribution coliform samples the month following a coliform-positive sample result; PENALTY: $1,212; ENFORCEMENT COORDINATOR: Abigail Lindsey, (512) 239-2576; REGIONAL OFFICE: 12100 Park 35 Circle, Austin, Texas 78753, (512) 339-2929.

(17) COMPANY: Minesh Patel and Nayna Patel dba Time Saver Grocery; DOCKET NUMBER: 2012-0607-PWS-E; IDENTIFIER: RN104100011; LOCATION: Spring, Harris County; TYPE OF FACILITY: public water system; RULE VIOLATED: 30 TAC §290.106(e), by failing to provide the results of annual nitrate monitoring to the TCEQ's executive director; 30 TAC §290.106(e), by failing to provide the results of triennial mineral monitoring to the TCEQ's executive director; 30 TAC §290.109(c)(2)(A)(i) and Texas Health and Safety Code (THSC), §341.033(d), by failing to collect a routine distribution water sample for coliform analysis for the month of July 2011; 30 TAC §290.109(f)(3) and THSC, §341.031(a), by failing to comply with the maximum contaminant level for total coliform during the month of August 2011; 30 TAC §290.109(c)(2)(F), by failing to collect five distribution coliform samples the month following a coliform positive sample result; and 30 TAC §290.51(a)(6) and TWC, §5.702, by failing to pay all annual Public Health Service fees, for fiscal year 2012, including any associated late fees and penalties, for TCEQ financial Administration Account Number 91012996; PENALTY: $1,401; ENFORCEMENT COORDINATOR: Bridgett Lee, (512) 239-2565; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: New Siara Properties, LP and Mainland Petroleum, Incorporated dba Noor Pantry Texaco; DOCKET NUMBER: 2012-0459-PST-E; IDENTIFIER: RN102274263; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued underground storage tank (UST) delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(a) and (c)(1), by failing to monitor the USTs for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring) and by failing to provide release detection for the piping associated with the UST system; and 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damages caused by accidental releases arising from the operation of petroleum USTs; PENALTY: $16,477; ENFORCEMENT COORDINATOR: Bridgett Lee, (512) 239-2565; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(19) COMPANY: North Texas Municipal Water District; DOCKET NUMBER: 2011-1738-MWD-E; IDENTIFIER: RN101701332 (Facility 1) and RN102095585 (Facility 2); LOCATION: Mesquite, Dallas County and McKinney, Collin County; TYPE OF FACILITY: wastewater treatment plants; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0012446001, Interim I Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with the permitted effluent limitations at Facility 1; TWC, §26.121(a)(1) and TPDES Permit Number WQ0012446001, Permit Conditions Number 2.g, by failing to prevent the unauthorized discharge of untreated wastewater from the collection system at Facility 2; TWC, §26.039(b), 30 TAC §305.125(9)(A), and TPDES Permit Number WQ0012446001, Monitoring and Reporting Requirements Number 7, by failing to notify the TCEQ Dallas/Fort Worth Region office within 24 hours of the unauthorized discharge of approximately 34,000 gallons of wastewater from the collection system at Facility 2; and TWC, §26.121(a)(1), 30 TAC §305.125(1), and TPDES Permit Number WQ0012446001, Interim I Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with the permitted effluent limitations at Facility 2; PENALTY: $46,937; Supplemental Environmental Project offset amount of

$46,937 applied to Texas Association of Resource Conservation and Development Areas, Incorporated - Water or Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 430-6023; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(20) COMPANY: ORTHOPEDIC HOSPITAL LIMITED; DOCKET NUMBER: 2012-1880-PST-E; IDENTIFIER: RN101908119; LOCATION: Houston, Harris County; TYPE OF FACILITY: hospital; RULE VIOLATED: 30 TAC §334.50(a)(1)(A), by failing to provide release detection; PENALTY: $3,500; ENFORCEMENT COORDINATOR: Maggie Dennis, (512) 239-2578; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(21) COMPANY: Pecan Pipeline Company; DOCKET NUMBER: 2012-1168-AIR-E; IDENTIFIER: RN105476691; LOCATION: Bowie, Montague County; TYPE OF FACILITY: natural gas processing plant; RULE VIOLATED: 30 TAC §116.615(1) and §122.143(4); Standard Permit Registration Number 84338; Federal Operating Permit Number O3240/General Operating Permit Number 514, Site-wide requirements (b)(2) and (b)(8)(E)(ii); and Texas Health and Safety Code (THSC), §382.085(b), by failing to prevent unauthorized emissions; 30 TAC §101.201(a) and THSC, §382.085(b), by failing to determine if Incident Number 166600 was reportable and submit an initial notification within 24 hours after discovery of the emissions event; and 30 TAC §101.201(a) and THSC, §382.085(b), by failing to determine if Incident Number 166603 was reportable and submit an initial notification within 24 hours after discovery of the emissions event; PENALTY: $16,250; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 422-8938; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(22) COMPANY: Robert Garcia; DOCKET NUMBER: 2012-1291-MSW-E; IDENTIFIER: RN106379068; LOCATION: Alamo, Hidalgo County; TYPE OF FACILITY: unauthorized disposal site involving management of municipal solid waste (MSW); RULE VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of MSW; PENALTY: $3,750; ENFORCEMENT COORDINATOR: Maggie Dennis, (512) 239-2578; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(23) COMPANY: Samah Enterprises, Incorporated dba Quick Destiny Food Mart; DOCKET NUMBER: 2012-0451-PST-E; IDENTIFIER: RN102055076; LOCATION: Grand Prairie, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(a) and (c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and by failing to provide release detection for the pressurized piping associated with the UST system; PENALTY: $2,136; ENFORCEMENT COORDINATOR: Jacquelyn Green, (512) 239-2587; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(24) COMPANY: Southern Union Pipeline, Ltd.; DOCKET NUMBER: 2012-1047-AIR-E; IDENTIFIER: RN100215532; LOCATION: Barstow, Ward County; TYPE OF FACILITY: gas compression and treatment plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), Texas Health and Safety Code, §382.085(b), Federal Operating Permit Number O3186, Special Terms and Conditions Number 7, and New Source Review Permit Number 1306, Special Conditions Numbers 1 and 10, by failing to comply with the operational limitations and allowable annual emissions rates; PENALTY: $9,700; ENFORCEMENT COORDINATOR: Amancio R. Gutierrez, (512) 239-3921; REGIONAL OFFICE: 9900 West IH-20, Suite 100, Midland, Texas 79706, (432) 570-1359.

(25) COMPANY: Texas Department of Transportation; DOCKET NUMBER: 2011-2055-PST-E; IDENTIFIER: RN102232618; LOCATION: Bryan, Brazos County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $2,250; Supplemental Environmental Project offset amount of $1,800 applied to Texas Association of Resource Conservation and Development Areas, Incorporated - Cleanup of Unauthorized Trash Dumps; ENFORCEMENT COORDINATOR: Audra Benoit, (409) 899-8799; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(26) COMPANY: Texas H2O, Incorporated; DOCKET NUMBER: 2012-1229-MWD-E; IDENTIFIER: RN102079605; LOCATION: Granbury, Hood County; TYPE OF FACILITY: wastewater treatment plant and associated collection system; RULE VIOLATED: 30 TAC §305.125(1) and (9), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0013025001, Monitoring and Reporting Requirements Number 7.a and b.i., by failing to report an unauthorized discharge to the TCEQ Regional Office within 24 hours of becoming aware of the noncompliance; and TWC, §26.121(a)(1), 30 TAC §305.125(1) and §327.5, Texas Health and Safety Code, §341.012(a), and TPDES Permit Number WQ0013025001, Permit Conditions Number 2.g., by failing to prevent the discharge of wastewater into or adjacent to water in the state and by failing to abate immediately; PENALTY: $5,000; ENFORCEMENT COORDINATOR: Jill Russell, (512) 239-4564; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(27) COMPANY: The Consolidated Water Supply Corporation dba Consolidated Water Supply Corporation Beria System; DOCKET NUMBER: 2012-1074-PWS-E; IDENTIFIER: RN101176279; LOCATION: Houston County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(q)(1), by failing to provide a copy of a boil water notification to the executive director; 30 TAC §290.39(j), by failing to notify the executive director prior to making any significant change or addition to the system's production, treatment, storage, pressure maintenance, or distribution facilities; and 30 TAC §290.41(c)(3)(A), by failing to obtain approval by the executive director prior to placing a well into service as a public water supply source; PENALTY: $451; ENFORCEMENT COORDINATOR: Jim Fisher, (512) 239-2537; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(28) COMPANY: Tiger Corner, Incorporated; DOCKET NUMBER: 2012-1180-PST-E; IDENTIFIER: RN103052635; LOCATION: Glenrose, Somervell County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the underground storage tank system; PENALTY: $2,438; ENFORCEMENT COORDINATOR: Ana Quinones, (512) 239-2608; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(29) COMPANY: Wyman-Gordon Forgings, Incorporated; DOCKET NUMBER: 2012-1056-IWD-E; IDENTIFIER: RN100217413; LOCATION: Houston, Harris County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0001402000, Effluent Limitations and Monitoring Requirements Number 1, Outfall Numbers 001 and 002, by failing to comply with permitted effluent limitations; PENALTY: $22,687; ENFORCEMENT COORDINATOR: Jacquelyn Green, (512) 239-2587;

REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-201205383
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 16, 2012

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Correction Notice to Agreed Order with Soney Joseph DBA Race Runner 3

In the August 3, 2012, issue of the *Texas Register* (37 TexReg 5830), the Texas Commission on Environmental Quality (commission) published a Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions. This correction notice specifically concerns the Agreed Order with Soney Joseph DBA Race Runner 3.

The error is as submitted by the commission and occurs within the VIOLATION section of the order. The commission inadvertently included an extra digit in the Texas Water Code citation as part of the initial notice and submitted it as: "TWC, §26.34759(d)." The correct citation should read as: "TWC, §263475(d)."

For any questions concerning this notice, please contact Jim Sallans, (512) 239-2053.

TRD-201205393
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 16, 2012

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Enforcement Orders

An agreed order was entered regarding LINH-SON BUDDHIST ASSOCIATION OF AUSTIN, TEXAS, Docket No. 2010-2034-EAQ-E on September 27, 2012 assessing $5,250 in administrative penalties with $1,050 deferred.

Information concerning any aspect of this order may be obtained by contacting JR Cao, Enforcement Coordinator at (512) 239-2543, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Leander Independent School District, Docket No. 2011-1074-PST-E on September 27, 2012 assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting Steve Villatoro, Enforcement Coordinator at (512) 239-4930, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mohammad Saleem dba Burleson Stop, Docket No. 2011-1273-PST-E on September 27, 2012 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at (512) 239-0789, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Campbell Concrete & Materials LLC, Docket No. 2011-1346-IWD-E on September 27, 2012 assessing $3,000 in administrative penalties with $600 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator at (254) 761-3034, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding United States Army Corps of Engineers, Docket No. 2011-1406-PWS-E on September 27, 2012 assessing $877 in administrative penalties with $175 deferred.

Information concerning any aspect of this order may be obtained by contacting Katy Schumann, Enforcement Coordinator at (512) 239-2602, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Roman C-Store, Inc. dba Red Mart, Docket No. 2011-2131-PST-E on September 27, 2012 assessing $2,945 in administrative penalties with $589 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BOASSO AMERICA CORPORATION, Docket No. 2012-0101-WR-E on September 27, 2012 assessing $3,000 in administrative penalties with $600 deferred.

Information concerning any aspect of this order may be obtained by contacting Jeremy Escobar, Enforcement Coordinator at (361) 825-3422, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding RED RIVER AUTHORITY OF TEXAS, Docket No. 2012-0174-PWS-E on September 27, 2012 assessing $1,050 in administrative penalties with $210 deferred.

Information concerning any aspect of this order may be obtained by contacting Bridget Lee, Enforcement Coordinator at (512) 239-2565, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding United States Army Corps of Engineers, Docket No. 2012-0332-PWS-E on September 27, 2012 assessing $560 in administrative penalties with $112 deferred.

Information concerning any aspect of this order may be obtained by contacting Katy Schumann, Enforcement Coordinator at (512) 239-2602, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tom Nguyen dba LT Knobhill Mini Mart, Docket No. 2012-0343-PST-E on September 27, 2012 assessing $2,105 in administrative penalties with $421 deferred.

Information concerning any aspect of this order may be obtained by contacting Margarita Dennis, Enforcement Coordinator at (512) 239-2578, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Terrell Trading Company Inc., Docket No. 2012-0370-PST-E on September 27, 2012 assessing $3,288 in administrative penalties with $657 deferred.

Information concerning any aspect of this order may be obtained by contacting Theresa Stephens, Enforcement Coordinator at (512) 239-2540, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chwiki Corp. dba Panther Market, Docket No. 2012-0374-PST-E on September 27, 2012 assessing $5,309 in administrative penalties with $1,061 deferred.

Information concerning any aspect of this order may be obtained by contacting Michaelle Sherlock, Enforcement Coordinator at (210) 403-4076, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Gerry Harris dba St. Elmo Corner Store, Docket No. 2012-0411-PST-E on September 27, 2012 assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Roshondra Lowe, Enforcement Coordinator at (713) 767-3553, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Howard Bigham dba Key RV Park, Docket No. 2012-0423-PWS-E on September 27, 2012 assessing $263 in administrative penalties with $52 deferred.

Information concerning any aspect of this order may be obtained by contacting Abigail Lindsey, Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Guardian Building Products Distribution, Inc. dba Cameron Ashley Building Products, Docket No. 2012-0436-PST-E on September 27, 2012 assessing $2,625 in administrative penalties with $525 deferred.

Information concerning any aspect of this order may be obtained by contacting Steven Van Landingham, Enforcement Coordinator at (512) 239-5717, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BASF Corporation, Docket No. 2012-0454-AIR-E on September 27, 2012 assessing $7,125 in administrative penalties with $1,425 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Podlipny, Enforcement Coordinator at (512) 239-2603, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding EAST BENGAL CORPORATION dba Bengal Food Store, Docket No. 2012-0493-PST-E on September 27, 2012 assessing $2,695 in administrative penalties with $539 deferred.

Information concerning any aspect of this order may be obtained by contacting Steven Van Landingham, Enforcement Coordinator at (512) 239-5717, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Bellevue, Docket No. 2012-0543-MWD-E on September 27, 2012 assessing $2,160 in administrative penalties with $432 deferred.

Information concerning any aspect of this order may be obtained by contacting Stephen Thompson, Enforcement Coordinator at (512) 239-2558, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Aqua Texas, Inc., Docket No. 2012-0569-PWS-E on September 27, 2012 assessing $665 in administrative penalties with $133 deferred.

Information concerning any aspect of this order may be obtained by contacting Abigail Lindsey, Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Port of Houston Authority, Docket No. 2012-0574-MWD-E on September 27, 2012 assessing $5,075 in administrative penalties with $1,015 deferred.

Information concerning any aspect of this order may be obtained by contacting JR Cao, Enforcement Coordinator at (512) 239-2543, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Quality Product Finishing, Inc., Docket No. 2012-0576-IWD-E on September 27, 2012 assessing $1,926 in administrative penalties with $385 deferred.

Information concerning any aspect of this order may be obtained by contacting Jacquelyn Green, Enforcement Coordinator at (512) 239-2587, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Pilgrim's Pride Corporation, Docket No. 2012-0587-IWD-E on September 27, 2012 assessing $7,280 in administrative penalties with $1,456 deferred.

Information concerning any aspect of this order may be obtained by contacting Lanae Foard, Enforcement Coordinator at (512) 239-2554, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ken Lim dba Payless Beer & Wine, Docket No. 2012-0589-PST-E on September 27, 2012 assessing $2,430 in administrative penalties with $486 deferred.

Information concerning any aspect of this order may be obtained by contacting Brianna Carlson, Enforcement Coordinator at (956) 430-6021, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Harcharn & Puneet Bhullar, Inc. dba Tony's Neighborhood Groceries, Docket No. 2012-0617-PST-E on September 27, 2012 assessing $2,550 in administrative penalties with $510 deferred.

Information concerning any aspect of this order may be obtained by contacting Bridget Lee, Enforcement Coordinator at (512) 239-2565, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Butler Water Supply Corporation, Docket No. 2012-0666-PWS-E on September 27, 2012 assessing $1,254 in administrative penalties with $250 deferred.

Information concerning any aspect of this order may be obtained by contacting Michaelle Sherlock, Enforcement Coordinator at (210) 403-4076, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MAPT Corporation dba Kwik Stop, Docket No. 2012-0670-PST-E on September 27, 2012 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Steven Van Landingham, Enforcement Coordinator at (512) 239-5717, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Westwood Independent School District, Docket No. 2012-0681-PST-E on September 27, 2012 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Abigail Lindsey, Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding LONE STAR GROWERS, L.P., Docket No. 2012-0682-IWD-E on September 27, 2012 assessing $1,350 in administrative penalties with $270 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator at (254) 761-3034, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ALVIN COUNTRY CLUB, L.L.C., Docket No. 2012-0689-PWS-E on September 27, 2012 assessing $100 in administrative penalties with $20 deferred.

Information concerning any aspect of this order may be obtained by contacting Katy Schumann, Enforcement Coordinator at (512) 239-2602, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding EnCana Oil & Gas (USA) Inc., Docket No. 2012-0701-AIR-E on September 27, 2012 assessing $938 in administrative penalties with $187 deferred.

Information concerning any aspect of this order may be obtained by contacting Amancio R. Gutierrez, Enforcement Coordinator at (512) 239-3921, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Kawal Financial, Inc. dba Kwik Mart Valero, Docket No. 2012-0723-PST-E on September 27, 2012 assessing $3,850 in administrative penalties with $770 deferred.

Information concerning any aspect of this order may be obtained by contacting David Carney, Enforcement Coordinator at (512) 239-2583, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hamshire-Fannett Independent School District, Docket No. 2012-0730-MWD-E on September 27, 2012 assessing $4,925 in administrative penalties with $985 deferred.

Information concerning any aspect of this order may be obtained by contacting Jacquelyn Green, Enforcement Coordinator at (512) 239-2587, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Reddy-Gator, Inc. dba Gator Stop 4, Docket No. 2012-0740-PST-E on September 27, 2012 assessing $1,687 in administrative penalties with $337 deferred.

Information concerning any aspect of this order may be obtained by contacting Brianna Carlson, Enforcement Coordinator at (956) 430-6021, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Upper Jasper County Water Authority, Docket No. 2012-0741-MWD-E on September 27, 2012 assessing $720 in administrative penalties with $144 deferred.

Information concerning any aspect of this order may be obtained by contacting Jill Russell, Enforcement Coordinator at (512) 239-4564, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SAIF MALIK ENTERPRISES, INC. dba All Season Food Store, Docket No. 2012-0764-PST-E on September 27, 2012 assessing $1,925 in administrative penalties with $385 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Houston, Docket No. 2012-0769-PST-E on September 27, 2012 assessing $2,550 in administrative penalties with $510 deferred.

Information concerning any aspect of this order may be obtained by contacting Danielle Porras, Enforcement Coordinator at (713) 767-3682, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding GOLDEN SPREAD REDI-MIX, INC., Docket No. 2012-0773-IWD-E on September 27, 2012 assessing $3,800 in administrative penalties with $760 deferred.

Information concerning any aspect of this order may be obtained by contacting Jeremy Escobar, Enforcement Coordinator at (361) 825-3422, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Lone Star Group, Inc. dba Shop & Save Food Mart, Docket No. 2012-0788-PST-E on September 27, 2012 assessing $2,055 in administrative penalties with $411 deferred.

Information concerning any aspect of this order may be obtained by contacting Danielle Porras, Enforcement Coordinator at (713) 767-3682, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding HOPI RIVER, INC. dba Wheeler Shell, Docket No. 2012-0798-PST-E on September 27, 2012 assessing $3,378 in administrative penalties with $675 deferred.

Information concerning any aspect of this order may be obtained by contacting Katy Schumann, Enforcement Coordinator at (512) 239-2602, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Steve Krug and Celia Krug dba C O's Supply Co, Docket No. 2012-0799-PST-E on September 27, 2012 assessing $2,005 in administrative penalties with $401 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Rex R. Worrell dba Hidden Oaks Golf Course, Docket No. 2012-0802-WR-E on September 27, 2012 assessing $500 in administrative penalties with $100 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Smart Materials, Inc., Docket No. 2012-0823-WQ-E on September 27, 2012 assessing $3,750 in administrative penalties with $750 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Cherokee County, Docket No. 2012-0832-PST-E on September 27, 2012 assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting Clinton Sims, Enforcement Coordinator at (512) 239-6933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The M/A/R/C Group, Docket No. 2012-0835-PST-E on September 27, 2012 assessing $1,300 in administrative penalties with $260 deferred.

Information concerning any aspect of this order may be obtained by contacting Michaelle Sherlock, Enforcement Coordinator at (210) 403-4076, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chil L. Baldridge dba YCS Market, Docket No. 2012-0854-PST-E on September 27, 2012 assessing $6,500 in administrative penalties with $1,300 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SWOORUP TRADELINK, LLC dba Pioneer Mini Mart, Docket No. 2012-0855-PST-E on September 27, 2012 assessing $3,500 in administrative penalties with $700 deferred.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at (512) 239-0789, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding NuStar Logistic, L.P., Docket No. 2012-0869-AIR-E on September 27, 2012 assessing $3,375 in administrative penalties with $675 deferred.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ESCONDIDO PLAZA, INC., Docket No. 2012-0916-PST-E on September 27, 2012 assessing $2,625 in administrative penalties with $525 deferred.

Information concerning any aspect of this order may be obtained by contacting Danielle Porras, Enforcement Coordinator at (713) 767-3682, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MRA Foods, Inc. dba ISOM Food Mart, Docket No. 2012-0939-PST-E on September 27, 2012 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Jeremy Escobar, Enforcement Coordinator at (361) 825-3422, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Trinity Bay Conservation District, Docket No. 2012-1019-MWD-E on September 27, 2012 assessing $5,300 in administrative penalties with $1,060 deferred.

Information concerning any aspect of this order may be obtained by contacting Jeremy Escobar, Enforcement Coordinator at (361) 825-3422, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-201205406
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 17, 2012

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Enforcement Orders

An agreed order was entered regarding FOTY, L.L.C. dba Pick N Pay 2, Docket No. 2011-0864-PST-E on October 8, 2012 assessing $2,975 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Phillip Goodwin, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding R&R Screen Graphics, LLC, Docket No. 2011-1217-MLM-E on October 8, 2012 assessing $5,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jennifer Cook, Staff Attorney at (512) 239-3400,Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding UNITED FORTUNE ENTERPRISE, INC. dba Paris Church's Chicken Shell, Docket No. 2011-1362-PST-E on October 8, 2012 assessing $2,629 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Joel Cordero, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mohammad A. Ghene dba Super Food Mart 12, Docket No. 2011-1606-PST-E on October 8, 2012 assessing $6,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Phillip Goodwin, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ADICO ENTERPRISES INC. dba Scarsdale Shell, Docket No. 2011-1793-PST-E on October 8, 2012 assessing $5,129 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Joel Cordero, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Del Rio, Docket No. 2011-1894-PWS-E on October 8, 2012 assessing $317 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Peipey Tang, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding E.Y.C Corporation, Docket No. 2011-1951-PST-E on October 8, 2012 assessing $7,295 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Peipey Tang, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CRYSTAL INTERNATIONAL, INC. dba Fuel Stop, Docket No. 2011-1963-PST-E on October 8, 2012 assessing $6,249 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Joel Cordero, Staff Attorney at (512) 239-3400, Texas Com-

mission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding DO'S INVESTMENTS, INC. dba Lake Houston Grocery, Docket No. 2011-2254-PST-E on October 8, 2012 assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Joel Cordero, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Puri Enterprises Inc dba HWY 105 GROCERY & DELI and UMA Enterprises Inc. dba HWY 105 GROCERY & DELI, Docket No. 2011-2261-PST-E on October 8, 2012 assessing $2,629 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Joel Cordero, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding GOLDEN 07 ENTERPRISES, INC. dba Bestop 3, Docket No. 2012-0046-PST-E on October 8, 2012 assessing $3,825 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Tammy L. Mitchell, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SPEEDY K MARKET INC., Docket No. 2012-0274-PST-E on October 8, 2012 assessing $5,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Joel Cordero, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Kory B. Wallace, Docket No. 2012-0293-LII-E on October 8, 2012 assessing $867 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Ryan Rutledge, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Brazos County, Docket No. 2012-0300-PST-E on October 8, 2012 assessing $6,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kari L. Gilbreth, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Alsenia M. Mayfield dba Corner Store, Docket No. 2012-0346-PST-E on October 8, 2012 assessing $2,634 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Ryan Rutledge, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding FALCON BROTHERS INC dba Texas Country Store 3, Docket No. 2012-0663-PST-E on October 8, 2012 assessing $1,587 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Ryan Rutledge, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-201205407
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 17, 2012

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **November 26, 2012.** TWC, §7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on November 26, 2012.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, TWC, §7.075 provides that comments on an AO shall be submitted to the commission in **writing.**

(1) COMPANY: A NUMAN, INC. d/b/a A Food Mart; DOCKET NUMBER: 2011-1915-PST-E; TCEQ ID NUMBER: RN102057809; LOCATION: 17015 Rolling Creek Drive, Houston, Harris County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the UST system for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); 30 TAC §334.72, by failing to report a suspected release to the TCEQ within 24 hours of discovery; and 30 TAC §334.74, by failing to investigate a suspected release within 30 days of discovery; PENALTY: $13,870; STAFF ATTORNEY: Kari L. Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: Ahmed Abu-Alghanam d/b/a Energy Exxon; DOCKET NUMBER: 2011-2004-PST-E; TCEQ ID NUMBER:

RN102985520; LOCATION: 3838 Andrews Highway, Odessa, Ector County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(4)(A)(vii), (C), and (5)(B)(ii), by failing to obtain a TCEQ delivery certificate by submitting a properly completed UST registration and self-certification form within 30 days of the ownership change; TWC, §26.3467(a) and 30 TAC §334.8(c)(5)(A)(i), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; and 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; PENALTY: $2,500; STAFF ATTORNEY: Kari L. Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Midland Regional Office, 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5406, (432) 570-1359.

(3) COMPANY: Aldine Independent School District; DOCKET NUMBER: 2012-0537-PST-E; TCEQ ID NUMBER: RN100552504; LOCATION: 1865 Aldine Bender Road, Houston, Harris County; TYPE OF FACILITY: underground storage tank (UST) system for fleet refueling; RULES VIOLATED: TWC, §26.3475(a) and 30 TAC §334.50(b)(2), by failing to provide proper release detection for the pressurized piping associated with the UST system; PENALTY: $2,950; STAFF ATTORNEY: Rebecca M. Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(4) COMPANY: James S. Scroggins; DOCKET NUMBER: 2011-0337-MSW-E; TCEQ ID NUMBER: RN100556653; LOCATION: 8102 Braniff Street, Houston, Harris County; TYPE OF FACILITY: facility that involves the management and/or the disposal of municipal solid waste (MSW); RULES VIOLATED: 30 TAC §330.15(a), by failing to prevent the unauthorized storage or disposal of MSW; PENALTY: $1,020; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(5) COMPANY: John Platis d/b/a South Main Diamond; DOCKET NUMBER: 2012-0556-PST-E; TCEQ ID NUMBER: RN103961546; LOCATION: 14647 Main Street, Houston, Harris County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: Texas Health and Safety Code (THSC), §382.085(b), 30 TAC §115.245(2), and TCEQ Agreed Order Docket Number 2009-0963-PST-E, Ordering Provision Number 2.b.i., by failing to verify proper operation of the Stage II equipment at least once every 12 months; THSC, §382.085(b), 30 TAC §115.242(1)(C) and (3), and TCEQ Agreed Order Docket Number 2009-0963-PST-E, Ordering Provision Number 2.b.ii., by failing to upgrade the Stage II equipment to onboard refueling vapor recovery compatible systems; and by failing to maintain the Stage II vapor recovery system in proper operating condition, as specified by the manufacturer and/or applicable California Air Resources Board Executive Order, and free of defects that would impair the effectiveness of the system; THSC, §382.085(b), 30 TAC §115.246(6) and (7)(A), and TCEQ Agreed Order Docket Number 2009-0963-PST-E, Ordering Provision Number 2.a., by failing to maintain Stage II records at the station; and 30 TAC §334.8(c)(5)(A)(iii), by failing to post a current delivery certificate at a location where it is clearly visible at all times; PENALTY: $58,560; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: Josephine Guzman DBA Guzman Quality Cleaners; DOCKET NUMBER: 2011-1665-MLM-E; TCEQ ID NUMBER: RN101681799; LOCATION: 504 Military Road, Brownsville, Cameron County; TYPE OF FACILITY: dry cleaning facility; RULES VIOLATED: 30 TAC §335.62 and 40 Code of Federal Regulations §262.11, by failing to conduct hazardous waste determinations for waste at the facility; 30 TAC §337.20(e)(3)(A), by failing to install a dike or other secondary containment structure around each dry cleaning unit and around each storage area for dry cleaning solvents, dry cleaning waste, or dry cleaning wastewater; and 30 TAC §337.20(f)(2), by failing to minimize release of non-chlorinated dry cleaning solvents delivered to dry cleaning units and solvent storage containers; PENALTY: $12,000; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(7) COMPANY: KAPADIA SADLER DEVELOPMENT, INC. d/b/a Kidd Jones 11; DOCKET NUMBER: 2012-0138-PST-E; TCEQ ID NUMBER: RN101828754; LOCATION: 6551 State Highway 31 East, Murchison, Henderson County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail gasoline sales; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); and TWC, §26.3475(a) and 30 TAC §334.50(b)(2), by failing to provide proper release detection for the pressurized piping associated with the UST system; PENALTY: $2,637; STAFF ATTORNEY: Joel Cordero, Litigation Division, MC 175, (512) 239-0672; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(8) COMPANY: PLEWDAWGS MARKET LLC; DOCKET NUMBER: 2011-2007-PST-E; TCEQ ID NUMBER: RN101888915; LOCATION: 11880 Farm-to-Market Road, Willis, Montgomery County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; and 30 TAC §115.246(7)(A) and Texas Health and Safety Code, §382.085(b), by failing to maintain all Stage II records and make them immediately available for review upon request by agency personnel; PENALTY: $2,400; STAFF ATTORNEY: Anna Treadwell, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-201205386
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 16, 2012

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Notice of Opportunity to Comment on Default Order of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Order (DO). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the pro-

posed penalty; the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **November 26, 2012.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of the proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on November 26, 2012.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DO and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DO shall be submitted to the commission in **writing.**

(1) COMPANY: GREEN LAND VENTURES, LTD.; DOCKET NUMBER: 2011-2249-EAQ-E; TCEQ ID NUMBER: RN105004683; LOCATION: the north side of Boerne Stage Road, 2.5 miles west of Interstate 10, San Antonio, Bexar County; TYPE OF FACILITY: land development and residential site; RULES VIOLATED: 30 TAC §213.23(j) and Edwards Aquifer Contributing Zone Plan Number 13-06072402A, Standard Conditions Number 14, by failing to ensure that permanent best management practices (BMPs) are implemented and function as designed; and 30 TAC §213.23(j) and Edwards Aquifer Contributing Zone Plan Number 13-06072402A, Standard Conditions Number 15, by failing to maintain the permanent BMPs after construction; PENALTY: $5,250; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

TRD-201205387
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 16, 2012

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Notice of Opportunity to Comment on Shutdown/Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Shutdown/Default Orders (S/DOs). Texas Water Code (TWC), §26.3475 authorizes the commission to order the shutdown of any underground storage tank (UST) system found to be noncompliant with release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The commission proposes a Shutdown Order after the owner or operator of a UST facility fails to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. The commission proposes a Default Order when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. In accordance with TWC, §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **November 26, 2012.** The commission will consider any written comments received and the commission may withdraw or withhold approval of an S/DO if a comment discloses facts or considerations that indicate that consent to the proposed S/DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed S/DO is not required to be published if those changes are made in response to written comments.

Copies of each of the proposed S/DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the S/DO shall be sent to the attorney designated for the S/DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on November 26, 2012.** Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission attorneys are available to discuss the S/DOs and/or the comment procedure at the listed phone numbers; however, comments on the S/DOs shall be submitted to the commission in **writing.**

(1) COMPANY: HAKRO INVESTMENTS LLC d/b/a Flip In Market; DOCKET NUMBER: 2012-0887-PST-E; TCEQ ID NUMBER: RN101539963; LOCATION: 5860 South Dick Price Road, Fort Worth, Tarrant County; TYPE OF FACILITY: UST system and a convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(a) and (c)(1) and 30 TAC §334.50(b)(1)(A), (2), (A)(i)(III), and (d)(1)(B)(ii), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring), by failing to provide release detection for the piping associated with the USTs, by failing to test the line leak detectors at least once per year for performance and operational reliability, and by failing to conduct reconciliation of detailed inventory control records at least once each month, sufficiently accurate to detect a release as small as the sum of 1.0% of the total substance flow-through for the month plus 130 gallons; TWC, §26.3475(d) and 30 TAC §334.49(b)(2), by failing to provide corrosion protection to all underground metal components of a UST system which is designed or used to convey, contain, or store regulated substances; and Texas Health and Safety Code, §382.085(b) and 30 TAC §115.245(2), by failing to verify proper operation of the Stage II vapor recovery system at least once every 12 months; PENALTY: $16,875; STAFF ATTORNEY: Mike Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: R K DREAMS INC and Gillani Energy Company; DOCKET NUMBER: 2012-0404-PST-E; TCEQ ID NUMBER:

RN102248051; LOCATION: 3501 South Peachtree Road, Balch Springs, Dallas County; TYPE OF FACILITY: UST system and convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a delivery certificate by submitting a properly completed UST registration and self-certification form within 30 days of operator change; TWC, §26.3467(a) and 30 TAC §334.8(c)(5)(A)(1), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of USTs; TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); TWC, §26.3475(c)(2) and 30 TAC §334.51(b)(2)(B), by failing to equip the USTs with spill containment and overfill prevention equipment; TWC, §26.3475(d) and 30 TAC §334.49(a)(1), by failing to provide proper corrosion protection for the UST system; and 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; PENALTY: $17,159; STAFF ATTORNEY: Rebecca M. Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-201205388
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 16, 2012

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Notice of Receipt of Application and Intent to Obtain Municipal Solid Waste Permit (Proposed) Permit No. 2382

APPLICATION. Netex Composting, Inc., P.O. Box 2008, Sulphur Springs, Hopkins County, Texas 75483-2008, a composting facility, has applied to the Texas Commission on Environmental Quality (TCEQ) for a Type V Permit. The applicant is requesting a permit to authorize the storage and processing activities associated with the processing of grease trap waste, septic waste and wastewater treatment sludge and the composting of the solids generated by the processing of these waste streams. The facility is located at 1000 CR 3372, Pickton, Hopkins County, Texas 75471. The TCEQ received the application on August 9, 2012. The permit application is available for viewing and copying at the Sulphur Springs Public Library, 611 Davis Street North, Sulphur Springs, Hopkins County, Texas 75482-2621. The following link to an electronic map of the site or facility's general location is provided as a public courtesy and is not part of the application or notice: http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=33.116388&lng=-95.368055&zoom=13&type=r. For exact location, refer to application.

ADDITIONAL NOTICE. TCEQ's Executive Director has determined the application is administratively complete and will conduct a technical review of the application. After technical review of the application is complete, the Executive Director may prepare a draft permit and will issue a preliminary decision on the application. Notice of the Application and Preliminary Decision will be published and mailed to those who are on the county-wide mailing list and to those who are on the mailing list for this application. That notice will contain the deadline for submitting public comments.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting on this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. TCEQ will hold a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments. Unless the application is directly referred for a contested case hearing, the response to comments, and the Executive Director's decision on the application, will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting reconsideration of the Executive Director's decision and for requesting a contested case hearing. A person who may be affected by the facility is entitled to request a contested case hearing from the commission. A contested case hearing is a legal proceeding similar to a civil trial in state district court.

TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST: your name, address, phone number; applicant's name and permit number; the location and distance of your property/activities relative to the facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; and, the statement "[I/we] request a contested case hearing." If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; identify an individual member of the group who would be adversely affected by the facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose. Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. The Commission will only grant a contested case hearing on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised in timely filed comments that were not subsequently withdrawn.

MAILING LIST. If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. To be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

AGENCY CONTACTS AND INFORMATION. All public comments and requests must be submitted either electronically at www.tceq.texas.gov/about/comments.html or in writing to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087. If you choose to communicate with the TCEQ electronically, please be aware that your email address, like your physical mailing address, will become part of the agency's public record. For more information about this permit application or the permitting process, please call the TCEQ's Public Education Program, Toll Free, at 1-800-687-4040. Si desea informa-

ción en español, puede llamar al 1-800-687-4040. Further information may also be obtained by contacting the consultant, Ms. Kathy J. Bell, MS, P.E., Principal Engineer, Bell Environment Engineering at (903) 967-2478.

TRD-201205404
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 17, 2012

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Notice of Water Quality Applications

The following notices were issued on October 3, 2012 through October 12, 2012.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

FPLE FORNEY LLC which operates the Forney Energy Center, has applied for a major amendment of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004359000 to include two internal outfalls from the North and South Stormwater Ponds. FPLE Forney, LLC has also requested a lower minimum dissolved oxygen limit at Outfall 001, removal of monitoring requirements for hexavalent chromium at Outfall 001, and a reduced sampling frequency for total suspended solids at internal Outfalls 101 and 201. The current permit authorizes the discharge of cooling tower blowdown and previously monitored effluent (low volume waste, including reverse osmosis reject water, via Outfall 101, and low volume waste, including Heat Recovery Steam Generator blowdown, via Outfall 201) at a daily average flow of 4,000,000 gallons per day. The facility is located at 900 West Broad Street, on the south side of U.S. Highway 80, 1.3 miles northwest of the intersection of Farm-to-Market Road 740 and U.S. Highway 80, northwest of the City of Forney, Kaufman County, Texas 75126.

WILLIAMSON COUNTY MUNICIPAL UTILITY DISTRICT NO 19 has applied for a new permit, proposed TPDES Permit No. WQ0015000001, to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 1,400,000 gallons per day. The facility will be located just west of Ronald Reagan Boulevard, approximately 2.5 miles north of the intersection of Ronald Reagan Boulevard and Highway 29 in Williamson County, Texas 78529.

CITY OF CARTHAGE has applied for a renewal of TPDES Permit No. WQ0010074003, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 3,600,000 gallons per day. The current permit authorizes the beneficial land application of treated sewage sludge on 31.3 acres of pasture land adjacent to the plant site. The facility is located at 839 County Road 401, east of the City of Carthage and south of Hoggs Bayou, approximately 1.5 miles east of the intersection of U.S. Highways 59 and 79 in Panola County, Texas 75633.

NORTH TEXAS MUNICIPAL WATER DISTRICT has applied for a renewal of TPDES Permit No. WQ0010363001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 24,000,000 gallons per day. The facility is located at 1500 Los Rios Boulevard, 200 feet east of Los Rios Boulevard, approximately 700 feet north of Farm-to-Market Road 544, one mile west of Farm-to-Market Road 544 crossing of Rowlett Creek and approximately 3.5 miles east of the City of Plano in Collin County, Texas 75086.

CITY OF TRINITY has applied for a renewal of TPDES Permit No. WQ0010617001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 610,000 gallons per day. The facility is located at 247 Pegoda Road (Farm-to-Market Road 356), in the City of Trinity, approximately a half mile east of the intersection of Emory Street and Pegoda Road in Trinity County, Texas 75862.

CITY OF JAMAICA BEACH has applied for a renewal of TPDES Permit No. WQ0011033001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 360,000 gallons per day. The facility is located approximately 600 feet east of Bob Smith Drive on Marina Drive within the boundaries of the City of Jamaica Beach in Galveston County, Texas 77554.

EMERALD FOREST UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0011201001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,500,000 gallons per day. The facility is located at 11720 Early Mist Court, 0.5 mile southeast of the intersection of Farm-to-Market Road 1960 (Jackrabbit Road) and Perry Road, 3,000 feet south of Greens Bayou and 5.75 miles north of the City of Houston in Harris County, Texas 77064.

MILLS ROAD MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0011907002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 900,000 gallons per day. The facility is located at 10128 Peachridge Drive, approximately 3,000 feet southwest of the intersection of Perry Road and Mills Road, northwest of the City of Houston in Harris County, Texas 77070.

US ARMY CORPS OF ENGINEERS has applied for a renewal of TPDES Permit No. WQ0012087001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 1,000 gallons per day. The facility is located at the Whitney Lake Dam Powerhouse, 285 County Road 3602, approximately 1 mile east of the intersection of State Highway 22 and Farm-to-Market Road 56 Clifton in Bosque County, Texas 76634.

CRANE CO has applied for a renewal of TPDES Permit No. WQ0012456001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 5,000 gallons per day. The facility is located immediately west of Johnson Road and approximately 9.8 miles west of the City of Conroe central business district on the south side of Farm-to-Market Road 2854 in Montgomery County, Texas 77316.

JOHN DAVID HAGERMAN AND MARTHA VOSS BYRD have applied for a renewal of TPDES Permit No. WQ0014800001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 700,000 gallons per day. The facility will be located approximately 2.4 miles north of Farm to Market Road 1488 and 1.8 miles west of Honea Egypt Road near the City of Magnolia in Montgomery County, Texas 77354.

TARKINGTON INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. WQ0014968001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 32,000 gallons per day. The facility is located at 2770 Farm-to-Market Road 163, approximately 1.5 miles east of the intersection of Farm-to-Market Road 163 and State Highway 321, and 8 miles southeast of the City of Cleveland in Liberty County, Texas 77327.

CHESAPEAKE LAND DEVELOPMENT COMPANY LLC has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015043001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 24,000 gallons per day. The facility will be located at 9013 North Interstate Highway 35, Pearsall, Texas, approximately 8,000 feet South of the intersection of Interstate Highway 35 and State Highway 57 and 2,500 feet west of Interstate Highway 35 in Frio County, Texas 78061.

The following do not require publication in a newspaper. Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, at the address provided in the information section above, WITHIN 30 DAYS OF THE ISSUED DATE OF THE NOTICE.

THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ) has initiated a minor amendment of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0000353000 issued to United States Gypsum Company, P.O. Box 525, Galena Park, Texas 77547, which operates Galena Park Plant, a gypsum wallboard and wallboard paper manufacturing facility, to re-issue the permit in accordance with 30 TAC §305.71, basin permitting for Segment No. 1007; and to revise the effective date of the effluent limits for Enterococci from May 18, 2014 to May 19, 2014. The existing permit authorizes the discharge of treated process wastewater, treated domestic wastewater, storm water, and boiler blowdown at a daily average flow not to exceed 375,000 gallons per day via Outfall 001. The facility is located at 1201 Gulf Compress Road (Mayo Shell Road), approximately 1.25 miles east of Loop 610 East and 0.5 mile south of Clinton Drive in the City of Galena Park, Harris County, Texas 77547.

THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ) has initiated a minor amendment of the Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0010962001 issued to Harris County Water Control and Improvement District No. 113 to correct the discharge route description from stating that the discharge route is only to Cypress Creek, to now stating that the discharge route is to Harris County Flood Control District (HCFCD) ditch K146-00-00; thence to Cypress Creek. The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The facility is located at 14601 Enchanted Valley Drive, approximately 2 miles northeast of the intersection of U.S. Highway 290 and Telge Road and 0.5 mile east of Telge Road in Harris County, Texas 77429.

THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ) has initiated a minor amendment of the Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0012918001 issued to Linda Dianne Hartzog, to authorize a reduction in the monitoring frequency for Carbonaceous Biochemical Oxygen Demand (5-day), Total Suspended Solids, Ammonia Nitrogen, Dissolved Oxygen and Total Kjeldahl Nitrogen from once per week to twice per month. The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 5,600 gallons per day. The facility is located at 909 Gulf Bank Road, 2.1 miles east of the intersection of Interstate Highway 45 and Gulf Bank Road in Harris County, Texas 77037.

If you need more information about these permit applications or the permitting process, please call the TCEQ Public Education Program, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.texas.gov. Si desea información en español, puede llamar al 1-800-687-4040.

TRD-201205405

Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 17, 2012

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Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5800.

Deadline: 8-Day Pre-Election Report due April 30, 2012, for Candidates and Officeholders

Bob Bagley, 15730 Dewberry Ln., Grangerland, Texas 77302-7514

Michael C. Barnes, P.O. Box 1000, Edcouch, Texas 78538-1000

Charles Reed Greene, 26254 IH10 West, Ste. 135, Boerne, Texas 78006

Donald L. Williams, 3301 Rain Dance Dr., El Paso, Texas 79936-2320

Deadline: 30-Day Pre-Election Report due April 30, 2012, for Committees

Paul J. Gebolys, Conservative Coalition of Montgomery County, 14 Pineash Court, The Woodlands, Texas 77381-2705

Deadline: 8-Day Pre-Election Reports due May 21, 2012, for Candidates and Officeholders

Mike J. Cervantes, 1013 Montana Ave., El Paso, Texas 79902-5411

Jack W. Pulcher, 7601 Bon Soir, Corpus Christi, Texas 78414

Deadline: 8-Day Pre-Election Report due May 21, 2012, for Committees

Keny Michael Apodaca, El Paso Young Democrats PAC, 3323 Sacramento Ave., El Paso, Texas 79930-4621

Deadline: Special Pre-Election Report due May 24, 2012, for Candidates and Officeholders

Oscar L. Longoria, Jr., P.O. Box 4224, Mission, Texas 78573-0073

Deadline: Semiannual Report due July 16, 2012, for Candidates and Officeholders

Ronald E. Reynolds, 6140 Hwy. 6 South, Ste. 233, Missouri City, Texas 77459

Deadline: Personal Financial Statement due April 30, 2012

J. Michael Bell, Sr., 14362 Markham Glen, San Antonio, Texas 78247

TRD-201205330
David Reisman
Executive Director
Texas Ethics Commission
Filed: October 12, 2012

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Texas Facilities Commission

Request for Proposals #303-4-20357

The Texas Facilities Commission (TFC), on behalf of the Health and Human Services Commission (HHSC), announces the issuance of Request for Proposals (RFP) #303-4-20357. TFC seeks a five (5) or ten

(10) year lease of approximately 8,640 square feet of office space in Weslaco, Hidalgo County, Texas.

The deadline for questions is November 5, 2012, and the deadline for proposals is November 19, 2012, at 3:00 p.m. The award date is January 16, 2013. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Regional Leasing Assistant, Evelyn Esquivel, at (512) 463-6494. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=102831*.

TRD-201205299
Kay Molina
General Counsel
Texas Facilities Commission
Filed: October 11, 2012

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General Land Office

Notice of Invitation for Offer for Renewal of Major Consulting Services

The Texas General Land Office (GLO) is seeking a consultant to provide services related to outreach and communications support and policy and program management under the Community Development Block Grant-Disaster Recovery Program (Program). The consultant will be responsible for maintaining essential relationships with grant recipients and proving advice in GLO policymaking decisions under the Program.

Pursuant to §2254.029 and §2254.031 of the Texas Government Code, the GLO is seeking to enter a contract for services previously provided by a subcontractor to another GLO vendor. The contract is expected to take effect on November 4, 2012, and terminate on December 31, 2016.

It is the intent of the GLO to award this contract to CapStar Program Consulting (CSC) subject to the approval of the Governor's Office of Budget and Planning as required by Texas Government Code §2254.028. CSC has previously provided these consulting services to the GLO with respect to the Program. Further information may be obtained by contacting Joe James, Texas General Land Office, 1700 N. Congress Avenue, Austin, Texas 78701-1495, telephone (512) 463-6293.

TRD-201205396
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: October 17, 2012

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Office of the Governor

Request for Grant Applications for the National Incident Based Reporting System Solicitation

The Criminal Justice Division (CJD) of the Governor's Office is soliciting applications for projects that reduce crime and improve the criminal justice system during the state fiscal year 2013 grant cycle.

Purpose: The purpose of this solicitation is to assist law enforcement agencies with the conversion of crime data from the Uniform Crime Report (UCR) format to the National Incident Based Reporting System (NIBRS) format.

Available Funding: Federal funds are authorized under the Edward Byrne Memorial Justice Assistance Grant Program (JAG) (42 U.S.C. 3751(a)). JAG funds are made available through a Congressional appropriation to the United States Department of Justice. All awards are subject to the availability of appropriated federal funds and any modifications or additional requirements that may be imposed by law.

Funding Levels:

Minimum: None

Maximum: None

Match Requirement: None

Standards: Grantees must comply with the standards applicable to this funding source cited in the *Texas Administrative Code* (1 TAC Chapter 3), and all statutes, requirements, and guidelines applicable to this funding.

Prohibitions: Grant funds may not be used to support the following services, activities, and costs:

(1) supplanting or use of grant funds to replace any other existing federal, state, or local funds;

(2) inherently religious activities such as prayer, worship, religious instruction, or proselytization;

(3) lobbying;

(4) any portion of the salary of, or any other compensation for, an elected or appointed government official;

(5) non-law enforcement vehicles or equipment for government agencies that are for general agency use;

(6) weapons, ammunition, explosives, or military vehicles;

(7) admission fees or tickets to any amusement park, recreational activity, or sporting event;

(8) promotional gifts;

(9) food, meals, beverages, or other refreshments;

(10) membership dues for individuals;

(11) fundraising;

(12) construction, renovation, or remodeling;

(13) medical services; and

(14) transportation, lodging, per diem, or any related costs for participants, when grant funds are used to develop and conduct training.

Eligible Applicants: Units of local government.

Eligibility Requirements:

(1) Projects must focus on upgrading records management systems to report crime to the Texas Department of Public Safety (DPS) in the National Incident-Based Reporting System (NIBRS) format;

(2) Successful applicants must agree to continue reporting data in the NIBRS format for all subsequent years;

(3) Applicants must provide law enforcement services in a jurisdiction with a population of 50,000 or greater;

(4) The county (or counties) in which the applicant is located must have an overall 90% average on reporting adult criminal history dis-

positions to the Texas Department of Public Safety for calendar years 2006 through 2010;

(5) Eligible applicants operating a law enforcement agency must be current on reporting Part I violent crime data to the Texas Department of Public Safety for inclusion in the annual Uniform Crime Report (UCR) and must have been current for the three previous years;

(6) Eligible applicants must have a DUNS (Data Universal Numbering System) number assigned to its agency; to request a DUNS number, go to http://fedgov.dnb.com/webform/displayHomePage.do; and

(7) Eligible applicants must be registered in the federal System for Award Management (SAM) database located at https://www.sam.gov/portal/public/SAM/ and maintain an active registration throughout the grant period.

Project Period: Grant-funded projects must begin on or after March 1, 2013, and expire on or before August 31, 2013.

Application Process: Applicants must access CJD's grant management website at https://eGrants.governor.state.tx.us to register and apply for funding.

Preferences: Preference will be given to applicants who demonstrate a cost effective approach to conversion of crime data to the NIBRS format.

Closing Date for Receipt of Applications: All applications must be certified via CJD's grant management website on or before December 21, 2012.

Selection Process:

(1) Applications will be considered based on population, with large jurisdictions receiving priority.

(2) For state discretionary projects, applications will be reviewed by CJD staff members or a review group selected by the executive director. CJD will make all final funding decisions based on eligibility, reasonableness, availability of funding, and cost-effectiveness.

Contact Information: If additional information is needed, contact the eGrants Help Desk at eGrants@governor.state.tx.us or (512) 463-1919.

TRD-201205409
David Zimmerman
General Counsel
Office of the Governor
Filed: October 17, 2012

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Texas Health and Human Services Commission

Medical Transportation Program - Stakeholder Forums

The Health and Human Services Commission (HHSC) will host stakeholder forums in ten areas across the state, beginning October 29, 2012. The purpose of the forums is to solicit public input regarding the Medical Transportation Program (MTP) service delivery models HHSC is considering as part of the restructuring of program operations. The forums will be held in Dallas, Fort Worth, Lubbock, El Paso, Houston, McAllen, Bryan/College Station, Tyler, San Antonio and Austin. The schedule of events is as follows:

October 29, 2012 - Austin: 11209 Metric Blvd. Bldg. H, Austin, Texas 78758, 9:00 a.m. - 12:00 noon

October 30, 2012 - El Paso: Education Services Center - Region 19, Paso Del Norte Room #2, 6611 Boeing Building A, El Paso, Texas 79925, 9:00 a.m. - 12:00 noon

November 1, 2012 - Houston: Houston Food Bank, 535 Portwall Street, Houston, Texas 77029, 9:00 a.m. - 12:00 noon

November 2, 2012 - Weslaco: Mid-Valley Campus, G191 - Lecture Hall, 400 N. Border Rd.,Weslaco, Texas 78596, 9:00 a.m. - 12:00 noon

November 5, 2012 - Tyler: Tyler Junior College West Campus, 1530 South Southwest Loop 323, Tyler, Texas 75701, 1:00 p.m. - 4:00 p.m.

November 6, 2012 - Fort Worth: Botanical Gardens, 3220 Botanic Gardens Blvd., Fort Worth, Texas 76107, 1:00 p.m. - 4:00 p.m.

November 7, 2012 - Dallas: Center for Community Cooperation, 2900 Live Oak, Oak Corner Room, Dallas, Texas 75204, 1:00 p.m. - 4:00 p.m.

November 8, 2012 - Lubbock: Texas Department of Transportation, Mesquite Room, 135 Slaton Road, Lubbock, Texas 79404, 9:00 a.m. - 12:00 noon

November 14, 2012 - Bryan: Commissioners Courtroom, 200 S. Texas Avenue, Suite 106, Bryan, Texas 77803, 2:00 p.m. - 5:00 p.m.

Option 1: Full-Risk Broker Expansion

HHSC successfully implemented two full-risk broker (FRB) models in the Houston/Beaumont and Dallas/FortWorth Service Delivery Areas (SDAs). This option would expand the FRB model to the remaining areas of the state not currently covered by the FRBs, roughly splitting statewide transportation services between one or more FRB contractors. The FRBs would be responsible for management of all non-emergency medical transportation (NEMT) services to include managed care clients, fee-for-service residual clients, Children with Special Healthcare Needs (CSHCN) Services Program clients, and Transportation for Indigent Cancer Patient (TICP) clients.

Option 2: Managed Care Carve-in

This option proposes to carve-in NEMT services into managed care; however, in the Dallas/Fort Worth and Houston/Beaumont SDAs, the FRBs would continue to provide services until contract expiration. Since NEMT services are provided to TCIP, CSHCN, and residual fee-for-service clients who are not served by managed care organizations, HHSC will need a complementary model to serve non-managed care clients. The non-managed care transportation services may be provided by a down-sized state operation or through a single FRB.

Option 3: Transportation Service Area Provider (TSAP) Enhancement

This model maintains the existing transportation service structure, but enhances certain administrative functions, and delays the agency's decision regarding a revised statewide service delivery plan. This option would extend the current TSAP model through June, 2015. The extension would allow time to collect adequate data for evaluation purposes and also aligns TSAP contract expiration with the expiration period for FRB contracts. Additionally, as a part of this model HHSC MTP call center operations would be outsourced.

Option 4: Regional Transportation Partnership

This option establishes a pilot regional public brokerage program in specific areas of the state for three years with three cooperating public transit districts - Brazos Transit, Capital Area Rural Transportation Services (CARTS) and Hill Country Transit (TSAPs 13, 12, and 23 respectively). The three transit districts would form a consortium to provide seamless and coordinated services to MTP clients in the 24-county region. In the remaining areas of the state, HHSC would have to pursue an alternate transportation model. Under an inter-local agreement with MTP, the consortium would assure dependable, economical and safe access to healthcare services throughout the region and, when neces-

sary, to distant destinations. By coordinating inter-district travel, public, healthcare and other special purpose trips and taking advantage of lower cost fixed-route bus services within the region, the regional public broker would be able to reduce waste and duplication and substantially lower per trip costs while enhancing mobility and access for the Medicaid population.

Option 5: Hybrid Model

For this option, NEMT services would be provided by either the full-risk broker or the managed care carve-in models described in options 1 and 2 and would require either entity to subcontract an agreed upon percentage of services through local transit authorities. This arrangement would allow the local transit authorities to continue providing service for MTP clients, especially in rural areas of the state.

Contact: LeShawn Manus, Medical Transportation Program, 1106 Clayton Lane, Austin, Texas 78723, phone (512) 706-4900, fax: (512) 706-4999, or e-mail leshawn.manus@hhsc.state.tx.us

This meeting is open to the public. No reservations are required and there is no cost to attend this meeting.

People with disabilities who wish to attend the meeting and require auxiliary aids or services should contact LeShawn Manus (512) 706-4900 at least 72 hours before the meeting so appropriate arrangements can be made.

TRD-201205390
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: October 16, 2012

♦ ♦ ♦

Notice of Public Hearing on Proposed Medicaid Payment Rates for Ambulance Services

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on November 14, 2012, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for ambulance services.

The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.201, which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The payment rates for Ambulance Services are proposed to be effective January 1, 2013.

Methodology and Justification. The proposed payment rates were calculated in accordance with 1 TAC §355.8600, which addresses reimbursement for ambulance services.

The proposed reimbursement rates reflect applicable reductions directed by the 2012-2013 General Appropriations Act, House Bill 1, 82nd Legislature, Regular Session, 2011 (Article II, All Health and Human Services Agencies, Section 16, at II-108). Detailed information related to specifics of the reductions can be found on the Medicaid fee schedules at http://public.tmhp.com/FeeSchedules/Default.aspx.

Briefing Package. A briefing package describing the proposed payments will be available at http://www.hhsc.state.tx.us/rad/rate-packets.shtml on or after November 1, 2012. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at esther.brown@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to esther.brown@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so that appropriate arrangements can be made.

TRD-201205294
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: October 10, 2012

♦ ♦ ♦

Notice of Public Hearing on Proposed Medicaid Payment Rates for Case Management for Children and Pregnant Women

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on November 14, 2012, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for case management services provided to children and pregnant women.

The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.201, which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The payment rates for case management for children and pregnant women are proposed to be effective January 1, 2013.

Methodology and Justification. The proposed payment rates were calculated in accordance with 1 TAC §355.8401, which addresses case management reimbursement methodology (for children and pregnant women).

The reimbursement rates proposed reflect applicable reductions directed by the 2012-2013 General Appropriations Act, House Bill 1, 82nd Legislature, Regular Session, 2011 (Article II, All Health and Human Services Agencies, Section 16, at II-108). Detailed information related to specifics of the reductions can be found on the Medicaid fee schedules at http://public.tmhp.com/FeeSchedules/Default.aspx.

Briefing Package. A briefing package describing the proposed payments will be available at http://www.hhsc.state.tx.us/rad/rate-packets.shtml on or after November 1, 2012. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at esther.brown@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC,

Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to esther.brown@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so that appropriate arrangements can be made.

TRD-201205295
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: October 10, 2012

♦ ♦ ♦

Notice of Public Hearing on Proposed Medicaid Payment Rates for Hearing Aids

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on November 14, 2012, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for hearing aids.

The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.201, which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The payment rates for hearing aids are proposed to be effective January 1, 2013.

Methodology and Justification. The proposed payment rates were calculated in accordance with 1 TAC §355.8085 which addresses the reimbursement methodology for physicians and other practitioners; and 1 TAC §355.8141 which addresses the reimbursement methodology for hearing aid services.

The reimbursement rates proposed reflect applicable reductions directed by the 2012-2013 General Appropriations Act, House Bill 1, 82nd Legislature, Regular Session, 2011 (Article II, All Health and Human Services Agencies, Section 16, at II-108). Detailed information related to specifics of the reductions can be found on the Medicaid fee schedules at http://public.tmhp.com/FeeSchedules/Default.aspx.

Briefing Package. A briefing package describing the proposed payments will be available at http://www.hhsc.state.tx.us/rad/rate-packets.shtml on or after November 1, 2012. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at esther.brown@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to esther.brown@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so that appropriate arrangements can be made.

TRD-201205293
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: October 10, 2012

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Notice of Public Hearing on Proposed Medicaid Payment Rates for Licensed Midwife Services in a Birthing Center

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on November 15, 2012, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for Licensed Midwife Services in a Birthing Center.

The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code, Title 1 (1 TAC) §355.201, which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The payment rates for Licensed Midwife Services in a Birthing Center are proposed to be effective January 1, 2013.

Methodology and Justification. The proposed payment rates were calculated in accordance with 1 TAC:

§355.8081, which addresses payments for laboratory and x-ray services, radiation therapy, physical therapists' services, physician services, podiatry services, chiropractic services, optometric services, ambulance services, dentists' services, psychologists' services, licensed psychological associates' services, maternity clinic services, and tuberculosis clinic services;

§355.8085, which addresses the reimbursement methodology for physicians and practitioners; and

§355.8181, which addresses the birthing center reimbursement.

The reimbursement rates proposed reflect applicable reductions directed by the 2012-2013 General Appropriations Act, H.B. 1, 82nd Legislature, Regular Session, 2011 (Article II, All Health and Human Services Agencies, Section 16, at II-108). Detailed information related to specifics of the reductions can be found on the Medicaid fee schedules at http://public.tmhp.com/FeeSchedules/Default.aspx.

Briefing Package. A briefing package describing the proposed payments will be available at http://www.hhsc.state.tx.us/rad/rate-packets.shtml on or after November 1, 2012. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at esther.brown@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to esther.brown@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail

Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so that appropriate arrangements can be made.

TRD-201205321
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: October 11, 2012

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Notice of Public Hearing on Proposed Medicaid Payment Rates for Primary Care Services and Vaccine Administration Services

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on November 15, 2012, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for primary care services and vaccine administration services provided by physicians specializing in family practice, internal medicine, or pediatrics as a result of the Affordable Care Act (ACA).

The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code, Title 1 (1 TAC) §355.201, which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The payment rates for primary care services and vaccine administration services provided by physicians specializing in family practice, internal medicine, or pediatrics as a result of the ACA are proposed to be effective January 1, 2013.

Methodology and Justification. The proposed payment rates were calculated in accordance with 1 TAC:

§355.8081, which addresses payments for laboratory and x-ray services, radiation therapy, physical therapists' services, physician services, podiatry services, chiropractic services, optometric services, ambulance services, dentists' services, psychologists' services, licensed psychological associates' services, maternity clinic services, and tuberculosis clinic services;

§355.8085, which addresses the reimbursement methodology for physicians and other practitioners; and

§355.8441, which addresses the reimbursement methodology for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) services.

The reimbursement rates proposed reflect applicable reductions directed by the 2012-2013 General Appropriations Act, H.B. 1, 82nd Legislature, Regular Session, 2011 (Article II, All Health and Human Services Agencies, Section 16, at II-108). Detailed information related to specifics of the reductions can be found on the Medicaid fee schedules at http://public.tmhp.com/FeeSchedules/Default.aspx.

Briefing Package. A briefing package describing the proposed payments will be available at http://www.hhsc.state.tx.us/rad/rate-packets.shtml on or after November 1, 2012. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at esther.brown@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to esther.brown@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so that appropriate arrangements can be made.

TRD-201205320
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: October 11, 2012

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Notice of Public Hearing on Proposed Medicaid Payment Rates for the Medicaid Biennial Calendar Fee Review

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on November 14, 2012, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for the Medicaid biennial calendar fee review.

The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.201, which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The payment rates for the Medicaid biennial calendar fee reviews for medical nutrition therapy and type of services 1, 2, I, and T (medical services, surgery, professional components, and technical components) are proposed to be effective January 1, 2013.

Methodology and Justification. The proposed payment rates were calculated in accordance with:

1 TAC §355.8081, which addresses payments for laboratory and x-ray services, radiation therapy, physical therapists' services, physician services, podiatry services, chiropractic services, optometric services, ambulance services, dentists' services, psychologists' services, licensed psychological associates' services, maternity clinic services, and tuberculosis clinic services;

1 TAC §355.8085, which addresses the reimbursement methodology for physicians and other practitioners; and

1 TAC §355.8441, which addresses the reimbursement methodology for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) services.

The reimbursement rates proposed reflect applicable reductions directed by the 2012-2013 General Appropriations Act, House Bill 1, 82nd Legislature, Regular Session, 2011 (Article II, All Health and Human Services Agencies, Section 16, at II-108). Detailed information related to specifics of the reductions can be found on the Medicaid fee schedules at http://public.tmhp.com/FeeSchedules/Default.aspx.

Briefing Package. A briefing package describing the proposed payments will be available at http://www.hhsc.state.tx.us/rad/rate-packets.shtml on or after November 1, 2012. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at esther.brown@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to esther.brown@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so that appropriate arrangements can be made.

TRD-201205292
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: October 10, 2012

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Notice of Public Hearing on Proposed Medicaid Payment Rates for Vaccine and Toxoids (Shingles Vaccine)

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on November 14, 2012, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for vaccine and toxoids (shingles vaccine).

The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.201, which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The payment rates for vaccine and toxoids (shingles vaccine) are proposed to be effective January 1, 2013.

Methodology and Justification. The proposed payment rates were calculated in accordance with:

1 TAC §355.8081, which addresses payments for laboratory and x-ray services, radiation therapy, physical therapists' services, physician services, podiatry services, chiropractic services, optometric services, ambulance services, dentists' services, psychologists' services, licensed psychological associates' services, maternity clinic services, and tuberculosis clinic services; and

1 TAC §355.8085, which addresses the reimbursement methodology for physicians and other practitioners.

The proposed reimbursement rates reflect applicable reductions directed by the 2012-2013 General Appropriations Act, House Bill 1, 82nd Legislature, Regular Session, 2011 (Article II, All Health and Human Services Agencies, Section 16, at II-108). Detailed information related to specifics of the reductions can be found on the Medicaid fee schedules at http://public.tmhp.com/FeeSchedules/Default.aspx.

Briefing Package. A briefing package describing the proposed payments will be available at http://www.hhsc.state.tx.us/rad/rate-packets.shtml on or after November 1, 2012. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at esther.brown@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to esther.brown@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance so that appropriate arrangements can be made.

TRD-201205290
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: October 10, 2012

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit transmittal number 12-037 to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The proposed amendment updates the State's policy on the provision of hearing aids to adults. Under the new policy, coverage for eligible recipients age 21 and older who have hearing loss in both ears will be limited to one hearing aid. Coverage will not be available for recipients age 21 and older who have hearing loss in only one ear. The requested effective date for the proposed amendment is October 1, 2012.

The proposed amendment is estimated to result in an annual aggregate savings of $27,538,754 for federal fiscal year (FFY) 2013, consisting of $16,330,481 in federal funds and $11,208,273 in state general revenue. For FFY 2014, the estimated savings is $28,406,224, consisting of $16,671,613 in federal funds and $11,734,611 in state general revenue. For FFY 2015, the estimated savings is $29,255,570, consisting of $17,170,094 in federal funds and $12,085,476 in state general revenue.

To obtain copies of the proposed amendment, interested parties may contact Brian Dees by mail at the Health and Human Services Commission, P.O. Box 13247, Mail Code H-100, Austin, Texas 78711; by telephone at (512) 491-1382; by facsimile at (512) 491-1977; or by e-mail at brian.dees@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201205376
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: October 15, 2012

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Department of State Health Services

Designation of Sites Serving Medically Underserved Populations

The Department of State Health Services (department) is required under the Occupations Code §157.052 to designate sites serving medically underserved populations. In addition, the department is required to publish notice of such designations in the *Texas Register* and to provide an opportunity for public comment on the designations.

Accordingly, the department has proposed designating the following as sites serving medically underserved populations based on proven eligibility as a site serving a disproportionate number of clients eligible for federal, state or locally funded health care programs:

Pflugerville Pediatrics

103 South 12th Street, Suite 10

Pflugerville, Texas 78660

Rockwall Medical Association

502 West Kearney, Suite 700

Mesquite, Texas 75149

Rockwall Medical Association

6800 Heritage Parkway, Suite 201

Rockwall, Texas 75087

Oral and written comments on these designations may be directed to Iris Rodriguez, Program Director, Health Professions Resource Center - Mail Code 1898, Center for Health Statistics, Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347; telephone (512) 776-2775. Comments will be accepted for 30 days from the publication date of this notice.

TRD-201205389
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: October 16, 2012

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Texas Department of Insurance

Company Licensing

Application to change the name of NORTH SEA INSURANCE COMPANY to LANCER INDEMNITY COMPANY, a fire and/or casualty company. The home office is in Long Beach, New York.

Application for admission to the State of Texas by ATX PREMIER INSURANCE COMPANY, a fire and/or casualty company. The home office is in Atlanta, Georgia.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, MC 305-2C, Austin, Texas 78701.

TRD-201205398
Sara Waitt
General Counsel
Texas Department of Insurance
Filed: October 17, 2012

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Notice of Informal Stakeholder Meeting

The Texas Department of Insurance provides notice of an informal stakeholder meeting to discuss and gather information relating to the determination of rates of assessments for expenses of examination of: (1) foreign and domestic insurance companies and workers' compensation self-insurance groups; (2) examinations, investigations, and general administrative expenses for the regulation of insurance premium finance companies; and (3) insurance maintenance taxes.

Insurance Code §§401.151 - 401.152 and 401.155 - 401.156 and Labor Code §407A.252 require the commissioner of insurance to determine rates for the assessments for expenses of examination of foreign and domestic insurance companies and workers' compensation self-insurance groups. Insurance Code §651.006 requires the commissioner of insurance to determine the rates for the assessments to cover the cost of examinations, investigations, and general administrative expenses for the regulation of insurance premium finance companies. Insurance Code Title 3 Subtitles C and D and Labor Code Chapters 403, 405, 407, and 407A require the commissioner of insurance to determine the rates for the assessments of insurance maintenance taxes.

Additionally, legislative changes passed during the 82nd Legislative Session that will have an impact on rates and assessment costs include, but are not limited to, the following: (1) Senate Bill 1291, 82nd Legislative Session, Regular Session, effective September 1, 2011; and (2) Rider 17, pages 1 - 26, Chapter 1355 (H.B. 1), Acts of the 82nd Legislature, Regular Session, 2011 (the General Appropriations Act). The department is gathering information to be utilized in adopting rules to establish the rates of each tax and assessment.

For these reasons, the department has scheduled an informal stakeholder meeting to be held on Thursday, November 1, 2012, from 1:00 - 3:00 p.m. in Room 1264, at the William P. Hobby Jr. State Office Building, Tower I, 333 Guadalupe Street, Austin, Texas. The purpose of the meeting is to provide information, receive comments and information from all parties, and to informally discuss the preliminary estimates of the projected rates of assessment, the supporting documentation and methodology of the process related to determining the estimated projected rates of assessment and fees, and the draft rules to establish the rates of each tax and assessment.

Shortly after the informal stakeholder meeting, the department will make available the proposed amendments to the rules that establish the rates of assessments and fees. The department will post the rule proposals on the department's website at http://www.tdi.texas.gov/rules/2012/parules.html and submit them for publication in the *Texas Register*. Interested persons may view the rule proposals at the department's website and may obtain copies of the rule proposals by submitting a request to the Office of the Chief Clerk, Texas Department of Insurance, MC113-1A, P.O. Box 149104, Austin, Texas 78714-9104.

If you have any questions, please contact the Office of the Chief Clerk at (512) 463-6327.

TRD-201205402
Sara Waitt
General Counsel
Texas Department of Insurance
Filed: October 17, 2012

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Texas Department of Licensing and Regulation

Public Notice - Criminal Conviction Guidelines

The Texas Commission of Licensing and Regulation ("Commission") provides this public notice that, at their regularly scheduled meeting held September 26, 2012, the Commission adopted the Texas

Department of Licensing and Regulation's ("Department") updated Criminal Conviction Guidelines pursuant to Texas Occupations Code, §53.025(a). These guidelines describe the process by which the Department determines whether a criminal conviction renders an applicant an unsuitable candidate for the license, or whether a conviction warrants revocation or suspension of a license previously granted. The guidelines present the general factors that are considered in all cases and the reasons why particular crimes are considered to relate to each type of license issued by the Department.

House Bill 1451, 82nd Legislature, Regular Session (2011), created a new chapter under Texas Occupations Code, Chapter 802, regarding licensed dog or cat breeders.

The updated Criminal Conviction Guidelines includes Licensed Dog or Cat Breeders and will become a part of the overall guidelines that are already in place for other Department programs. The Department presented the guidelines applicable to licensed dog or cat breeders to the Licensed Breeders Advisory Committee at their meeting of August 21, 2012, and received the Committee's recommendation of approval.

A copy of the updated Criminal Conviction Guidelines is posted on the Department's website and may be downloaded at www.license.state.tx.us. You may also contact the Enforcement Division at (512) 539-5600 or by email at enforcement@license.state.tx.us to obtain a copy of the updated guidelines.

TRD-201205380
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: October 16, 2012

♦ ♦ ♦

Public Notice - Revised Enforcement Plan

The Texas Commission of Licensing and Regulation (Commission) provides this public notice that at their regularly scheduled meeting held September 26, 2012, the Commission adopted the Texas Department of Licensing and Regulation's (Department) revised enforcement plan which was established in compliance with Texas Occupations Code, §51.302(c).

The enforcement plan gives all license holders notice of the specific ranges of penalties and license sanctions that apply to specific alleged violations of the statutes and rules enforced by the Department. The enforcement plan also presents the criteria that are considered by the Department's enforcement staff in determining the amount of a proposed administrative penalty or the magnitude of a proposed sanction.

The enforcement plan is revised to update penalty matrices for the Vehicle Towing and Booting and Vehicle Storage Facilities programs, and to adopt an original penalty matrix for the Vehicle Booting and Immobilization program. The Department assumed responsibility for all of these programs in September 2007. House Bill 2310, Acts of the 81st Legislature, amended Texas Occupations Code, Chapter 51, the Department's enabling statute, which required changes to Texas Administrative Code, Title 16, Chapter 60, concerning Procedural Rules of the Commission and the Department. One of the changes in the rules was to renumber the sections regarding fraud in seeking to obtain a license in both the Vehicle Towing and Booting and Vehicle Storage Facilities programs, which are Class H violations, referenced in the enforcement plan. The penalty matrices were also updated to reflect additional updates from the 81st Legislature, Senate Bill 702 and Senate Bill 2153, and the Department rules, which were put into effect because of these statute changes. House Bill 3510, Acts of the 82nd Legislature, modified the Vehicle Towing and Booting and Vehicle Storage Facilities programs, and rule changes from that statute update went into effect in January 2012. Finally, the penalty matrix was also updated to reflect public feedback on penalty amounts.

A copy of the revised enforcement plan is posted on the Department's website and may be downloaded at www.license.state.tx.us. You may also contact the Enforcement Division at (512) 539-5600 or by e-mail at enforcement@license.state.tx.us to obtain a copy of the revised plan.

TRD-201205379
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: October 16, 2012

♦ ♦ ♦

Texas Lottery Commission

Instant Game Number 1483 "Golden Spades"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1483 is "GOLDEN SPADES". The play style is "key number match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1483 shall be $5.00 per Ticket.

1.2 Definitions in Instant Game No. 1483.

A. Display Printing - That area of the Instant Game Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Ticket.

C. Play Symbol - The printed data under the latex on the front of the Instant Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, BLACK SPADE SYMBOL, $5.00, $10.00, $15.00, $20.00, $25.00, $40.00, $50.00, $100, $500, $1,000, and $50,000. The possible red Play Symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, and RED SPADE SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1483 - 1.2D

PLAY SYMBOL	CAPTION
1 (BLACK)	ONE
2 (BLACK)	TWO
3 (BLACK)	THR
4 (BLACK)	FOR
5 (BLACK)	FIV
6 (BLACK)	SIX
7 (BLACK)	SVN
8 (BLACK)	EGT
9 (BLACK)	NIN
10 (BLACK)	TEN
11 (BLACK)	ELV
12 (BLACK)	TLV
13 (BLACK)	TRN
14 (BLACK)	FTN
15 (BLACK)	FFN
16 (BLACK)	SXN
17 (BLACK)	SVT
18 (BLACK)	ETN
19 (BLACK)	NTN
20 (BLACK)	TWY
21 (BLACK)	TWON
22 (BLACK)	TWTO
23 (BLACK)	TWTH
24 (BLACK)	TWFR
25 (BLACK)	TWFV
26 (BLACK)	TWSX
27 (BLACK)	TWSV
28 (BLACK)	TWET
29 (BLACK)	TWNI
30 (BLACK)	TRTY
31 (BLACK)	TRON
32 (BLACK)	TRTO
33 (BLACK)	TRTH
34 (BLACK)	TRFR
35 (BLACK)	TRFV
36 (BLACK)	TRSX
37 (BLACK)	TRSV
38 (BLACK)	TRET
39 (BLACK)	TRNI
BLACK SPADE SYMBOL	WIN
1 (RED)	ONE
2 (RED)	TWO
3 (RED)	THR
4 (RED)	FOR
5 (RED)	FIV
6 (RED)	SIX

7 (RED)	SVN
8 (RED)	EGT
9 (RED)	NIN
10 (RED)	TEN
11 (RED)	ELV
12 (RED)	TLV
13 (RED)	TRN
14 (RED)	FTN
15 (RED)	FFN
16 (RED)	SXN
17 (RED)	SVT
18 (RED)	ETN
19 (RED)	NTN
20 (RED)	TWY
21 (RED)	TWON
22 (RED)	TWTO
23 (RED)	TWTH
24 (RED)	TWFR
25 (RED)	TWFV
26 (RED)	TWSX
27 (RED)	TWSV
28 (RED)	TWET
29 (RED)	TWNI
30 (RED)	TRTY
31 (RED)	TRON
32 (RED)	TRTO
33 (RED)	TRTH
34 (RED)	TRFR
35 (RED)	TRFV
36 (RED)	TRSX
37 (RED)	TRSV
38 (RED)	TRET
39 (RED)	TRNI
RED SPADE SYMBOL	WINX10
$5.00 (BLACK)	FIVE$
$10.00 (BLACK)	TEN$
$15.00 (BLACK)	FIFTN
$20.00 (BLACK)	TWENTY
$25.00 (BLACK)	TWY FIV
$40.00 (BLACK)	FORTY
$50.00 (BLACK)	FIFTY
$100 (BLACK)	ONE HUND
$500 (BLACK)	FIV HUND
$1,000 (BLACK)	ONE THOU
$50,000 (BLACK)	50 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the Ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $5.00, $10.00, $15.00, or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100, or $500.

H. High-Tier Prize - A prize of $1,000, $5,000, or $50,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1483), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 075 within each Pack. The format will be: 1483-0000001-001.

K. Pack - A Pack of "GOLDEN SPADES" Instant Game Tickets contains 075 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of Ticket 001 and back of 075 while the other fold will show the back of Ticket 001 and front of 075.

L. Non-Winning Ticket - A Ticket which is not programmed to be a winning Ticket or a Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "GOLDEN SPADES" Instant Game No. 1483 Ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each Instant Ticket. A prize winner in the "GOLDEN SPADES" Instant Game is determined once the latex on the Ticket is scratched off to expose 45 (forty-five) Play Symbols. If a player matches any of YOUR NUMBERS Play Symbols to any of the WINNING NUMBERS Play Symbols, the player wins the PRIZE for that number. If a player reveals a "BLACK SPADE" Play Symbol, the player wins the PRIZE for that symbol instantly. If a player reveals a "RED SPADE" Play Symbol, the player wins 10 TIMES the PRIZE for that symbol! No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game Ticket, all of the following requirements must be met:

1. Exactly 45 (forty-five) Play Symbols must appear under the Latex Overprint on the front portion of the Ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The Ticket shall be intact;

6. The Serial Number, Retailer Validation Code, and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Ticket;

8. The Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted, or tampered with in any manner;

9. The Ticket must not be counterfeit in whole or in part;

10. The Ticket must have been issued by the Texas Lottery in an authorized manner;

11. The Ticket must not have been stolen, nor appear on any list of omitted Tickets or non-activated Tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code, and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The Ticket must be complete and not miscut, and have exactly 45 (forty-five) Play Symbols under the Latex Overprint on the front portion of the Ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the Ticket;

14. The Serial Number of an apparent winning Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Tickets, and a Ticket with that Serial Number shall not have been paid previously;

15. The Ticket must not be blank or partially blank, misregistered, defective, or printed or produced in error;

16. Each of the 45 (forty-five) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 45 (forty-five) Play Symbols on the Ticket must be printed in the symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Ticket Serial Numbers must be printed in the serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Ticket. In the event a defective Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Ticket with another unplayed Ticket in that Instant Game (or a Ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive Non-Winning Tickets in a Pack will not have identical play data, spot for spot.

B. No duplicate WINNING NUMBERS Play Symbols on a Ticket.

C. No duplicate non-winning YOUR NUMBERS Play Symbols on a Ticket, regardless of color.

D. No more than four identical non-winning Prize Symbols on a Ticket.

E. A non-winning prize symbol will never be the same as a winning prize symbol.

F. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS Play Symbol (i.e., 5 and $5).

G. The "RED SPADE" (win x 10) Play Symbol will only appear on intended winning Tickets as dictated by the prize structure.

H. The "BLACK SPADE" (auto win) Play Symbol will never appear more than once on a Ticket or on a Ticket containing the "RED SPADE" (win x 10) Play Symbol.

I. There will be a minimum of four and a maximum of 12 red Play Symbols on every Ticket.

J. A match between a WINNING NUMBER and a YOUR NUMBER is a win, regardless of color.

K. The top prize symbol will appear at least once on every Ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "GOLDEN SPADES" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00, $100, or $500, a claimant shall sign the back of the Ticket in the space designated on the Ticket and present the winning Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100, or $500 Ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "GOLDEN SPADES" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "GOLDEN SPADES" Instant Game prize, the claimant must sign the winning Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. A sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the Ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under $600 from the "GOLDEN SPADES" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of $600 or more from the "GOLDEN SPADES" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Tickets ordered. The number of actual prizes available in a game may vary based on number of Tickets manufactured, testing, distribution, sales, and number of prizes claimed. An Instant Game Ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game Ticket in the space designated, a Ticket shall be owned by the physical possessor of said Ticket. When a signature is placed on the back of the Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name

or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Ticket in the space designated. If more than one name appears on the back of the Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game Tickets and shall not be required to pay on a lost or stolen Instant Game Ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 Tickets in the Instant Game No. 1483. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1483 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	480,000	12.50
$10	640,000	9.38
$15	180,000	33.33
$20	160,000	37.50
$50	80,000	75.00
$100	7,500	800.00
$500	800	7,500.00
$1,000	150	40,000.00
$5,000	20	300,000.00
$50,000	6	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.87. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1483 without advance notice, at which point no further Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Instant Game closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game Ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1483, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201205335
Bob Biard
General Counsel
Texas Lottery Commission
Filed: October 12, 2012

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Instant Game Number 1485 "$100,000 Cash"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1485 is "$100,000 CASH". The play style is "key number match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1485 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1485.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, MONEYBAG SYMBOL, STACK OF MONEY SYMBOL, $5.00, $10.00, $20.00, $25.00, $50.00, $100, $500, $1,000, $5,000, and $100,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1485 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
MONEYBAG SYMBOL	WIN
STACK OF MONEY SYMBOL	WIN ALL
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$25.00	TWY FIV

$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$5,000	FIV THOU
$100,000	HUN THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $5.00, $10.00, or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100, $200, or $500.

H. High-Tier Prize - A prize of $1,000, $5,000 or $100,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1485), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1485-0000001-001.

K. Pack - A pack of "$100,000 CASH" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "$100,000 CASH" Instant Game No. 1485 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "$100,000 CASH" Instant Game is determined once the latex on the ticket is scratched off to expose 45 (forty-five) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any of the WINNING NUMBERS play symbols, the player wins the PRIZE for that number. If a player reveals a "MONEYBAG" play symbol, the player wins the PRIZE for that symbol instantly. If a player reveals a "STACK OF MONEY" play symbol, the player WINS ALL 20 PRIZES! No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game Ticket, all of the following requirements must be met:

1. Exactly 45 (forty-five) Play Symbols must appear under the Latex Overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code, and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted, or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code, and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 45 (forty-five) Play Symbols under the Latex Overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective, or printed or produced in error;

16. Each of the 45 (forty-five) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 45 (forty-five) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. No duplicate WINNING NUMBERS play symbols on a ticket.

C. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

D. No more than four identical non-winning prize symbols on a ticket.

E. A non-winning prize symbol will never be the same as a winning prize symbol.

F. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e., 5 and $5).

G. When the "STACK OF MONEY" (win all) play symbol appears, there will be no occurrence of any of YOUR NUMBERS play symbols matching to any WINNING NUMBERS play symbol.

H. The "STACK OF MONEY" (win all) play symbol will only appear on intended winning tickets as dictated by the prize structure.

I. The "MONEYBAG" (auto win) play symbol will never appear more than once on a ticket.

J. The top prize symbol will appear at least once on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "$100,000 CASH" Instant Game prize of $5.00, $10.00, $20.00, $50.00, $100, $200, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100, $200, or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "$100,000 CASH" Instant Game prize of $1,000, $5,000 or $100,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "$100,000 CASH" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. A sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under $600 from the "$100,000 CASH" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of $600 or more from the "$100,000 CASH" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales, and number of prizes claimed. An Instant Game Ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game Ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game Tickets and shall not be required to pay on a lost or stolen Instant Game Ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 1485. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1485 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	480,000	12.50
$10	600,000	10.00
$20	280,000	21.43
$50	51,500	116.50
$100	11,950	502.09
$200	2,500	2,400.00
$500	2,300	2,608.70
$1,000	300	20,000.00
$5,000	16	375,000.00
$100,000	6	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.20. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1485 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the instant ticket game closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game Ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1485, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201205336
Bob Biard
General Counsel
Texas Lottery Commission
Filed: October 12, 2012

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Texas Public Finance Authority

Vacancy on the Charter School Finance Corporation Board

The Texas Public Finance Authority (TPFA) is seeking qualified individuals to serve on its Charter School Finance Corporation Board of Directors (CSFC Board). There is one vacancy on the five-member CSFC Board. CSFC Board members serve two-year staggered terms. The CSFC Board typically meets only a few times a year. Applicants should have some knowledge of public finance issues and/or knowledge of open enrollment charter schools. Furthermore, applicants should have no conflicts of interest that would interfere with their consideration of applications for financing or grants submitted by an open enrollment charter holder. Applicants should submit a resume with a brief cover letter explaining their interest in serving, their education or experience in public finance or charter school public education issues, and a description of any relationships that may create a conflict of interest in serving on the board, or an affirmative statement that no such relationships are known to exist. Submit the required information electronically to paula.hatfield@tpfa.state.tx.us or by mail or delivery to the Texas Public Finance Authority c/o CSFC Board, 300 W. 15th Street, Room 411, Austin, Texas 78701, by 5:00 p.m. on December 1, 2012.

For more information about the Charter School Finance Corporation, please visit http://www.tpfa.state.tx.us/csfc/. Contact John Hernandez at (512) 463-3101 for inquiries.

TRD-201205297
Susan Durso
General Counsel
Texas Public Finance Authority
Filed: October 10, 2012

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Public Utility Commission of Texas

Announcement of Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on October 15, 2012, for a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Broadband Fiber, LLC for a State-Issued Certificate of Franchise Authority, Project Number 40852.

The requested CFA service area consists of the State of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All inquiries should reference Project Number 40852.

TRD-201205394
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 16, 2012

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Notice of Application for a Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on October 15, 2012, for a certificate of operating authority (COA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Teleport Communications America, LLC for a Certificate of Operating Authority, Docket Number 40856.

Applicant intends to provide facilities-based and resale telecommunications services.

Applicant proposes to provide service within the geographic areas currently being served by TCG Dallas and Teleport Communications Houston, Inc., including all LATAs in Texas, subject to availability of facilities.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477 no later than November 2, 2012. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll-free at (800) 735-2989. All comments should reference Docket Number 40856.

TRD-201205395
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 16, 2012

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Notice of Application for a Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on October 12, 2012, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of O1 Communications Central, LLC for a Service Provider Certificate of Operating Authority, Docket Number 40840.

Applicant intends to provide facilities-based and resale telecommunications services.

Applicant proposes to provide service within the exchanges currently being served by Southwestern Bell Telephone Company d/b/a AT&T Texas and Verizon Southwest (Verizon).

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477 no later than November 2, 2012. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll-free at (800) 735-2989. All comments should reference Docket Number 40840.

TRD-201205384
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 16, 2012

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Notice of Application for Designation as an Eligible Telecommunications Carrier

Notice is given to the public of a petition filed with the Public Utility Commission of Texas on October 12, 2012, for designation as an eligible telecommunications carrier (ETC) in the State of Texas for the

limited purpose of offering Lifeline Service to qualified households, pursuant to P.U.C. Substantive Rule §26.418.

Docket Title and Number: Application of TX Mobile Telephone Services Company for Designation as an Eligible Telecommunications Carrier in the State of Texas for the Limited Purpose of Offering Lifeline Service. Docket Number 40848.

The Application: TX Mobile Telephone Services Company (TX Mobile) seeks ETC designation solely to provide lifeline service to qualifying Texas households as a prepaid wireless carrier. It will not seek access to funds from the federal universal service fund for the purpose of providing service to high cost areas. TX Mobile requests ETC designation for wireless operations in all the requested wire centers of the non-rural ILECs AT&T Texas, Verizon and Central Telephone Co. of Texas d/b/a CenturyLink. A list of requested wire centers is attached to the application as Exhibit 3. TX Mobile is a reseller of commercial mobile radio service throughout the United States. TX Mobile provides prepaid wireless telecommunications services to consumer by using the Sprint Nextel network.

Persons who wish to comment on this application should notify the Public Utility Commission of Texas by November 9, 2012. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326 or you may call the Public Utility Commission's Customer Protection Division at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989 to reach the commission's toll-free number (888) 782-8477. All comments should reference Docket Number 40848.

TRD-201205392
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 16, 2012

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Notice of Application for Waiver from Requirements in Automatic Dial Announcing Devices Application Form

Notice is given to the public of an application filed on October 10, 2012, with the Public Utility Commission of Texas (commission) for waiver of a requirement in the commission prescribed application for a permit to operate automatic dial announcing devices (ADAD).

Docket Style and Number: Application of Invacare HCS, LLC for a Waiver to the Federal Registration Number Requirement of the ADAD Application Form, Docket Number 40837.

The Application: Invacare HCS, LLC filed a request for a waiver of the registration number requirement in the Public Utility Commission of Texas prescribed application for a permit to operate automatic dial announcing devices. Specifically, Question 11(e) of the application requires the Federal Registration Number (FRN) issued to the ADAD manufacturer or programmer either by the Federal Communications Commission (FCC) or Administrative Council Terminal Attachments (ACTA).

Invacare stated that its hosted provider, Noble Systems, does not have and cannot obtain an FCC/ACTA registration number, and therefore is requesting a waiver.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 40837.

TRD-201205340
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 12, 2012

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Notice of Application to Amend Designation as an Eligible Telecommunications Carrier and Eligible Telecommunications Provider

Notice is given to the public of an application filed with the Public Utility Commission of Texas on October 11, 2012, to amend its designation as an eligible telecommunications provider (ETP) and eligible telecommunications carrier (ETC) pursuant to P.U.C. Substantive Rule §26.417 and §26.418, respectively.

Docket Title and Number: Application of Grande Communications Networks, LLC to Amend its Designation as an Eligible Telecommunications Carrier (ETC) and Eligible Telecommunications Provider (ETP). Docket Number 40846.

The Application: The company requests an amendment to its ETC and ETP designation to expand the study area to include the following four additional exchanges served by AT&T Texas: Flour Bluff and Padre Island in the Corpus Christi region, and McGregor and South Bosque in the Waco area.

Persons who wish to comment upon the action sought should notify the Public Utility Commission of Texas no later than November 9, 2012. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326 or you may call the Public Utility Commission's Customer Protection Division at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll-free at 1-800-735-2989. All comments should reference Docket Number 40846.

TRD-201205385
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 16, 2012

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Texas Department of Transportation

Request for Proposals - Toll Operations and Customer Service Center Operator

The Texas Department of Transportation (department) issues this Request for Proposals (RFP) to procure services from a prime vendor with high quality systems to support the operation of the customer service center (CSC) and toll plazas for current and future toll facilities in Texas. Pursuant to Transportation Code, §228.052, the department may seek to enter into an agreement with one or more persons to provide personnel, equipment, systems, facilities, and/or services necessary to operate a toll project or system, including but not necessarily limited to, the operation of customer service centers and the collection of tolls. The Texas Transportation Commission has promulgated rules located at 43 Texas Administrative Code §27.83, governing the requirements for soliciting proposals to operate a department toll project or system.

Purpose: The department is seeking proposals from qualified vendors interested in providing CSC services supporting present and future toll projects throughout the state and toll operations services for the Central Texas Turnpike System. The department seeks a vendor to provide staff, systems, and supplies required to establish, operate, and maintain the TxTag statewide CSC operation in accordance with the department's business rules and the requirements of the scope of work, and manage and maintain the existing toll plaza operations and facilities.

To Obtain a Copy of the RFP: Requests for a copy of the RFP should be submitted to Ms. Kathy Garrett, Texas Department of Transportation, Toll Operations Division, 12719 Burnet Road, Austin, Texas 78727; telephone: (512) 874-9723; email: Kathy.Garrett@txdot.gov. The RFP is also available at the following website: http://www.txdot.gov/business/opportunities/toll-ops-csc-op-rfp.html.

Proposal Submission Deadline: Wednesday, December 12, 2012 at 3:00 p.m.

Additional Information: The department has operated toll roads in Texas since 2006. Additional information regarding facility background and descriptions can be researched at http://www.texastollways.com.

TRD-201205403
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: October 17, 2012

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Texas State Soil and Water Conservation Board

Request for Applications - Flood Control Structural Repair Grant Program

The Texas State Soil and Water Conservation Board (TSSWCB) is seeking applications for structural repair projects on flood control dams defined in the Texas Administrative Code, Title 31, Part 17, Chapter 529, Subchapter B, §529.51(4).

Rules for the Flood Control Structural Repair Grant Program have been adopted by the TSSWCB and may be found on the TSSWCB website at: *http://www.tsswcb.texas.gov/files/docs/Flood%20Control/Chapter%20529-Flood%20Control.pdf.* Grant funds may be awarded through a contract between the TSSWCB and any sponsor of a flood control dam as defined by the program rules. Entities or individuals not meeting the definition of sponsor in the program rules may not apply for grant funds. Contracts to multiple sponsors may be needed to accomplish a single project.

Grant funds may be used to:

* Provide not more than 95% of the cost of performing structural repair activities.

* Provide not more than 95% of the non-federal matching funds required for a rehabilitation project performed by the United States Department of Agriculture - Natural Resources Conservation Service through the Federal Dam Rehabilitation Program.

* Provide not more than 95% of the non-federal matching funds required for an Emergency Watershed Protection Program project performed by the United States Department of Agriculture - Natural Resources Conservation Service.

NOTE - Applications submitted for previous fiscal years that did not result in a grant award will be considered for Fiscal Year 2013 funds unless the applicant instructs otherwise. A separate application for Fiscal Year 2013 funding may be necessary. Contact Lee Munz at (254) 773-2250 ext. 241 if you are unsure if a new application is required.

Application forms for the three allowable project types listed above are available and must be downloaded from the TSSWCB's website at: *http://www.tsswcb.texas.gov/floodcontrol.*

Applications for Fiscal Year 2013 grant funds are due no later than 8:00 a.m. on November 30, 2012. Applications should be submitted to:

Texas State Soil and Water Conservation Board

ATTENTION: FLOOD CONTROL

P.O. Box 658

Temple, Texas 76503

The TSSWCB may begin discussions with some applicants immediately upon receipt of an application to expedite the obligation of funds. Initial contact by the TSSWCB with an applicant does not signify an obligation of funds. Significant discussion may be necessary between the TSSWCB and certain applicants to determine the viability of a project.

For assistance in completing an application, please contact the TSSWCB at (254) 773-2250, or send an email to all of the following to ensure a quick response:

Lee Munz, lmunz@tsswcb.texas.gov, Phone Extension - 241

John Foster, jfoster@tsswcb.texas.gov, Phone Extension - 235

Richard Egg, regg@tsswcb.texas.gov, Phone Extension - 246

TRD-201205325
Mel Davis
Special Projects Coordinator
Texas State Soil and Water Conservation Board
Filed: October 12, 2012

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Upper Rio Grande Workforce Development Board

Request for Applications

The Upper Rio Grande Workforce Development Board publishes this Request for Applications (RFA) to invite training providers to develop and implement integrated college and accelerated career pathway models in targeted key industry sectors in the region, identified as health care, construction, transportation, distribution and logistics, and manufacturing.

Release Date: October 9, 2012

Submission Deadline: November 7, 2012, 5:00 p.m. MST

ALL DOCUMENTS MUST BE SUBMITTED BY ESTABLISHED DUE DATES AND TIMES ABSOLUTELY NO EXCEPTIONS.

Upper Rio Grande Workforce Development Board d/b/a Workforce Solutions Upper Rio Grande

300 E. Main, Suite 800

El Paso, Texas 79901

Telephone: (915) 887-2600

TRD-201205298

Joseph G. Sapien
Program Administrator
Upper Rio Grande Workforce Development Board
Filed: October 11, 2012

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Workforce Solutions Capital Area

Invitation for Bids: Fuel Management System/Gasoline Cards Service

Workforce Solutions Capital Area (WFS Capital Area) is seeking proposals from vendors to provide a Fuel Management System/Gasoline Cards Service for the Austin area. Invitation for Bids hard copy package can be picked up at WFS Capital Area, 6505 Airport Boulevard, Suite 101E, Austin, Texas 78752 or visit our web site at www.wfscapitalarea.com.

For information contact: Julie LeRoy at (512) 597-7280 or e-mail julie.leroy@wfscapitalarea.com. The submission due date is October 24, 2012 by 3:00 p.m.

TRD-201205296
Alan D. Miller
Executive Director
Workforce Solutions Capital Area
Filed: October 10, 2012

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 36 (2011) is cited as follows: 36 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "36 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 36 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online at: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the internet. For website information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac.

The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Index of Rules***. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
40 TAC §3.704.....950 *(P)*